IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 56

UNITED STATES, *Petitioner*,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, *Respondents*

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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Norfolk, Va.,
December 27, 1946.

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In The

Supreme Court of the United States

October Term, 1946

No. 56

UNITED STATES OF AMERICA, *Petitioner*

v.

LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, *Respondents.*

BRIEF ON BEHALF OF RESPONDENTS

I.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Petitioner's Brief, p. 2).

II.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia, Norfolk Division (R. 18), in the instant case, is reported in 60 F. Supp. 433. The opinion of the Circuit Court of Appeals (R. 30) is reported in 152 F. (2d) 228.

United States v. *Atlantic Coast Line Railroad Company* (No. 57), now pending and set for argument in this Court following the instant case, is substantially identical with it. The opinion of the District Court for the Eastern District of Virginia, Richmond Division, in that case is not reported. In effect it adopted the

opinion of the District Court in the instant case. The opinion of the Circuit Court of Appeals in the *Atlantic Coast Line* case is reported in 152 F. (2d) 230.

III.

SUMMARY STATEMENT OF THE ISSUE AND THE POSITION OF RESPONDENTS

In August, 1941, fifty-six (56) carloads of phosphate rock and twenty-two (22) carloads of superphosphate, property of the United States, were transported over the respondents' railroad (hereinafter called "the Seaboard"), consigned to the British Ministry of War Transport for export to England under the lend-lease program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). The issue presented is whether or not these shipments were entitled to move subject to so-called land-grant deductions from the full commercial rates, under the provisions of Section 321(a) of the Transportation Act of 1940, 54 Stat. 898, 954, U. S. Code, Title 49, Section 65(a).

Section 321(a), so far as pertinent here, reads:

> "Notwithstanding any other provision of law. * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any * * * property for the United States or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

This statute effected the abolition, subject to the exception stated, of so-called land-grant rates, which were charges substantially less than the full commercial rates. Prior to the enactment of Section 321(a), the reduced land-grant rates were required to be accorded the United States in respect of the transportation of all government property in consideration of early governmental grants of public lands to sundry railroads. We shall have occasion at a later point in this brief to outline the history of land-grant rates and discuss the considerations which led to their abolition (*post*, pp. 28-41).

The case turns upon the question whether or not the shipments were at the time of their transportation by the Seaboard "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of the exception contained in Section 321(a).*

As to the intended and actual use in Great Britain of both the phosphate rock and the superphosphate, the facts are stipulated (R. 15-16), as follows:-

> "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain therefore found it necessary to revise her agricultural practices in order to intensify production of food for direct human consumption. It was necessary to put into production a large acreage of land normally not used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphate rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act."

Further as to the character of the shipments and their intended and actual use, it appears that the specification in the contract covering the purchase of the superphosphate (Exhibit 7; R. 8, 10) called for "concentrated phosphatic fertilizer" and required that it be "properly cured" and "delivered in such physical condition as will permit its use by the farmer in the usual fertilizer distributing methods."

It is thus established that the shipments constituted agricultural property moving for agricultural use. In common understanding,

* Hereinafter the terms "military property" and "military use" are used as inclusive of both military and naval property and use.

agriculture ranks among those occupations farthest removed from the belligerent callings. As to the shipments here involved, therefore, the question is whether the bare circumstance that these materials moved for export under the lend-lease program is enough to override proof of intended use as agricultural fertilizer and constitute phosphate rock and superphosphate military property moving for military and not for civil use. Differently stated, the ultimate issue is whether all lend-lease material, regardless of its inherent character, its properties, or its intended and actual use, is to be regarded as *ipso facto* military property moving for military and not for civil use. (Cf. Petitioner's 4th and 5th assignments of error, Petn. for Certiorari, p 6, and Petitioner's Brief, pp. 18, 44, 102.)

It is the position of respondents (1) that the Lend-Lease Act contemplated and provided for export of not only military property moving for military use but also civilian property moving for civil and not for military use; (2) that this is established by the language of the Act itself and by the practical construction uniformly applied in its execution and repeatedly approved by Congress; and (3) that therefore the circumstance that the shipments here involved moved for export under the lend-lease program does not establish, or even indicate, that the material transported was military property moving for military and not for civil use, within the meaning of the exception contained in Section 321(a) of the Transportation Act of 1940.

We shall proceed at once to argument in support of this position. In doing so we present our answer to the proposition upon which, in our view, Petitioner's case must necessarily rest, namely, that lend-lease material is, merely by virtue of being lend-lease, and without regard to the inherent nature of the material or the character of its intended and actual use, military property moving for military and not for civil use.

IV.

ARGUMENT

The Lend-Lease Act, entitled "An Act to Promote the Defense of the United States," became law on March 11, 1941. The United States was then at peace. But France had fallen, the power of Germany was at its peak, and England stood alone. The gravity of the consequent threat to the Western Hemisphere, including the United States, was recognized as an impelling cause for all defensive measures short of war. Lend-lease was the most conspicuous measure then adopted. A copy of the Act appears in Appendix A to this brief (p. 50). Both on its face, and under consistent practical construction repeatedly approved and adopted by Congress, the Act contemplated and, among other things, provided for exportation of civilian property moving for civil and not for military use.

The Act authorized the President, when he deemed it in the interest of national defense, to sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any country whose defense he deemed vital to the defense of the United States, any "defense article," as that term was defined in the Act. By subsection (a) of Section 2 of the Act, "defense article" was defined as including:

> "(1) Any weapon, munition, aircraft, vessel, or boat;
>
> "(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;
>
> "(3) Any component material or part of or equipment for any article described in this subsection;
>
> "(4) Any agricultural, industrial or other commodity or article for defense."

The terms and conditions upon which any foreign government was to receive lend-lease aid under the Act "shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory."

Such, in essence, was the Lend-Lease Act. It carried no appropriation, but for its initial execution, on March 27, 1941, the first of a series of Appropriation Acts became law (Pub. No. 23, 77th Cong., 1st Session). It appropriated:

> "(a) For the procurement, by manufacture or otherwise, of defense articles for the government of any country whose defense the President deems vital to the defense of the United States, including services and expenses in connection therewith, as follows:
>
> "(1) Ordnance and ordnance stores, supplies, spare parts, and materials, including armor and ammunition and components thereof, $1,343,000,000.
>
> "(2) Aircraft and aeronautical material, including engines, spare parts, and accessories, $2,054,000,000.
>
> "(3) Tanks, armored cars, automobiles, trucks, and other automotive vehicles, spare parts, and accessories, $362,000,000.
>
> "(4) Vessels, ships, boats and other watercraft, and equipage, supplies, materials, spare parts, and accessories, $629,000,000.
>
> "(5) Miscellaneous military equipment, supplies and materials, $260,000,000.
>
> "(6) Facilities and equipment, for the manufacture or production of defense articles, by construction or acquisition, including the acquisition of land, and the maintenance and operation of such facilities and equipment, $752,000,000.
>
> "(7) Agricultural, industrial, and other commodities and articles, $1,350,000,000."

By Section 5(b) of the Lend-Lease Act, the President was required from time to time, but not less frequently than once every ninety days, to report to Congress operations under the Act. These reports were made accordingly. They are germane to the issue and will be discussed in some detail hereinafter. They supplied, in part at least, the information upon which Congress repeatedly appropriated prodigious sums for prosecution of the lend-lease program. It was stipulated that these reports might be referred to without objection and without their formal introduction in evidence. (R. 16, 36)

1. The Lend-Lease Act, on Its Face, Provided for Aid in Terms of Civilian Property Destined for Civil Use as Well as Military Property Destined for Military and Not for Civil Use.

That the Lend-Lease Act did not confine aid to countries whose defense the President deemed vital to the defense of the United States to military property destined for military and not for civil use becomes apparent upon careful consideration of the definition of "defense articles" contained in the Act. That definition was plainly designed to include, and by its language it did include, the whole vast category of articles and commodities required for the prosecution of "total war," as we have come to know it.

War in our time, as everyone knows, is no mere combat at arms between contesting military and naval forces. Successful prosecution of modern war requires mobilization, and dedication to the war effort, of civilian and military personnel alike. The entire economy of belligerent nations must be devoted to prosecution of the war. The "home front" attains an importance equal to that of the "fighting front." War today is a contest in industrial production, agriculture and transportation as truly as it is a contest at arms.

Despite Petitioner's argument to contrary, total war has served to emphasize, rather than to obscure, the distinction between what, in common understanding, is military or naval on the one hand, and civilian on the other. Industrial and agricultural occupations are recognized as emphatically civilian, non-military and non-naval occupations. The very emphasis placed upon their essentiality to the war effort, reflected in deferment or exemption from military service of key men in industry and agriculture, underscores the continuing distinction in war, as in peace, between what is civilian and what is military or naval.

Clearly, effective aid through lend-lease to countries whose successful prosecution of modern war was deemed vital to our own defense must comprise aid commensurate with the scope of present-day war effort. The whole economy of the country we would sustain in its prosecution of war must be buttressed. Aid

limited to the supply of military property for use by the fighting forces would fall far short of "all out" assistance. Aid in the production of arms, munitions and food was equally essential. This was fully recognized in the definition of "defense articles" contained in the Act. That definition comprised civilian as well as military equipment and supplies.

Under the definition, the President might supply to a foreign country as lend-lease aid, not only "any weapon, munition, aircraft, vessel, or boat,"—which were covered by item (1) and may be taken as military or naval in character,—but also, under item (2), "any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation" of any weapon, munition, aircraft, vessel or boat. The whole range of equipment necessary for the manufacture, construction and production of weapons, munitions, airplanes and watercraft was thus brought within the scope of lend-lease. Certainly, a machine tool in the hands of a civilian worker in a munitions factory in the environs of London was no more military property for military use than was a similar tool in the hands of a worker in a munitions factory in Detroit. It would have been fanciful to describe industrial workers as soldiers or sailors and their machinery and tools as military property.

But the definition of "defense article" yet more clearly shows that aid in terms of civilian goods for civil use was contemplated and provided for. Item (2) comprised any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation "of any article described in this subsection." It is thus clear that any tool or equipment useful in the manufacture or production of any tool or equipment useful in the manufacture or production of any weapon, munition, aircraft, vessel or boat, was within the scope of lend-lease, and so on *ad infinitum*. It was like the house that Jack built. And designedly and quite reasonably so. For the whole gamut of industrial production was essential to total war. But industrial production was distinctly a civilian contribution to the war effort, and industrial equipment was civilian property devoted to a civil and not a military use.

As has been noted, the definition of "defense article" included, in item (2), any "supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection." Among the articles of supply vital to production of weapons, munitions, aircraft, vessels and boats and to production of machinery, facilities, tools, materials and supplies necessary for the production of weapons, munitions, aircraft, vessels and boats, was food. When the Lend-Lease Act became law submarine warfare threatened to starve England into submission. That threat, of course, was not confined to the fighting forces but included as well the entire civilian population. In those dark days, food for England was conspicuous among the "supplies" essential to keep her fighting. And to keep England fighting called for an adequate supply of food for the toiling workers of the home front as well as rations for the soldiers and sailors on the fighting front. Clearly, then, food and all things necessary for the production of food were comprised within the definition of defense articles. This brought within the scope of lend-lease not only food itself but the whole vast category of agricultural implements and supplies. The tractor, the plow share, the rake and the hoe, seed, fertilizer, and all things requisite to intensified production of food were articles of defense dispensable as lend-lease aid. But the plow share turning the soil of England was no more military property devoted to military and not to civil use than was the plow share used to cultivate the fields of Virginia or Maryland. Farming in England was no less a civilian occupation than farming here. It would be fanciful to describe the farmer as a soldier and his implements as arms. Here again, lend-lease is shown to have comprised civilian goods for civil use as well as military goods for military, and not for civil, use.

Reference has thus far been made only to items (1) and (2) of the definition of defense articles. Item (3) brought within the scope of lend-lease "any component material or part of or equipment for any article described in this subsection." If anything was needed beyond items (1) and (2) to make lend-lease all-inclusive, item (3) did the work. It comprised any "com-

ponent material" of any "weapon, munition, aircraft, vessel or boat" and any component material of any "machinery, facility, tool, material or supply necessary for the manufacture, production, processing, repair, servicing, or operation" of any defense article. This brought within the definition substantially all raw materials, whether in the vegetable or mineral kingdom. Products of the mine were added to products of agriculture and products of the forest as articles dispensable under the lend-lease program. Again, a miner wielding his pick in the substratum of England was no more a soldier with a weapon in his hands than was the coal miner in Pennsylvania or the worker in the phosphate mines of Florida. His implements, his supplies and the products of his labor were alike civilian property used or destined for use distinctly civil and not military in character. Yet all these were within the scope of lend-lease assistance.

Item (4) of the statutory definition of defense articles in the bill as introduced in Congress, read:

> "(4) Any other commodity or article for defense."*

In the statute, as enacted by Congress and approved by the President, item (4) read:

> "(4) Any agricultural, industrial or other commodity or article for defense."

The change was made by way of amendment on the floor of the Senate.**

It appears obvious that item (4) of the definition, both in its original and in its final form, was carefully devised to accomplish the purpose plainly intended, namely, the elimination of the smallest chance that by narrow construction of the preceding items the term "defense article" might be taken as less than all-inclusive. We have seen that items (1), (2) and (3) in fact embraced the entire fields of industrial, mineral and agricultural production. But the authors of the bill, in order to foreclose

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*Transcript of Hearings before Committee on Foreign Affairs, House of Representatives, 77th Congress, January 15, 1941, page 1; Transcript of Hearings before the Committee on Foreign Relations, United States Senate, 77th Congress, January 27, 1941, page 1.

**Congressional Record, Vol. 87, pp. 2097-9.

argument, added item (4): "any other commodity or article for defense." And the Congress, to make assurance doubly sure and foreclose any attempt to limit defense articles to commodities of a military character, enlarged item (4) to include "any *agricultural, industrial,* or other commodity or article for defense."*

If lend-lease was not thereby made all-inclusive, and if the character of material transported for export under the lend-lease program was not thereby rendered wholly consistent with the character of civilian goods moving for civil use, the English language is singularly inept as an instrument for the expression of thought and intent.

Recognizing that the amendment was a work of supererogation, yet at the same time sponsoring its adoption, Senator Barkley, in charge of the bill for the Administration, said:**

> "Mr. Barkley: Mr. President, during the discussion of the bill in the committee and on the floor various amendments have been suggested pertaining to agriculture. All along it has been our interpretation of the bill, and is now, that in the definition of defense articles, subsection 4, page 2, 'any other commodity or article for defense' is broad enough to include just what it says, 'any other commodity', which would cover agriculture, industry, or anything else. The Senator from Georgia (Mr. Russell), the Senator from Montana (Mr. Murray), the Senator from Oklahoma (Mr. Lee), and others, including the Senator from Wisconsin (Mr. Wiley), have discussed this matter. In order that there may be no doubt that the word 'commodity' includes agricultural commodities, I send forward an amendment and ask that it be agreed to."

The amendment altered item (4) as above set forth, and it was agreed to by voice vote.***

In the course of debate Mr. Clark, of Missouri, opposing the bill, said:****

> "Mr. President, the other day I challenged any Senator to rise on this floor and tell me anything which was not

*Emphasis throughout this brief supplied.
**Congressional Record, Vol. 87, p. 2097.
***Congressional Record, Vol. 87, p. 2099.
****Congressional Record, Vol. 87, p. 2098.

included in the definition of defense article, as found in Section 2 of the bill, and no Senator rose; and no Senator has been willing from the very beginning of this debate to try to define any article or any commodity, or any substance of any kind that is not included in the very broad generic term 'defense article.'"

Explaining the Senate Amendment to the House, Representative Bloom said:*

> "Amendment No. 1: This amendment is to emphasize what was already implicit in the House bill—that the term 'defense article' includes agricultural and industrial articles which are for defense. The amendment in no way changes the legal effect of the House bill."

Thus, friend and foe of the bill alike regarded and characterized the scope of lend-lease as inclusive of any and all commodities which conceivably might contribute to the defense of any country whose defense the President deemed vital to the defense of the United States.

We, in this country, learned at first hand the true meaning of "defense" in terms of modern warfare. In respect of our own war effort, we clearly recognized civilian goods for civil use as essential to the conduct of war. American farms, mines, factories, and transportation facilities were alike dedicated to prosecution of war. Strikes among civilian workers were condemned as subversive of the war effort. Civilians whose occupations were essential to efficiency in industrial and agricultural production and in transportation were retained in civilian life, and exempted or deferred from military or naval service. As already pointed out, it would have been fanciful to characterize the miner in Pennsylvania, the farmer in Virginia or Maryland and the factory worker in Detroit as soldiers or sailors, and the implements of their several occupations as arms. There is no consideration which requires or justifies a different concept of defense in other countries whose defense was deemed vital to our own. In England, as in the United States, "defense" connoted devotion of the entire energy and economy of the country to the

*Congressional Record, Vol. 87, pp. 2217-18.

assurance and hastening of victory. When we sent to England's assistance materials for consumption in industry and agriculture we contributed, not military property for military use, but aid on the "home front" in the shape of civilian goods for civil use.

The foregoing analysis of the Lend-Lease Act demonstrates fallacy at the root of the case for the United States. The circumstance that phosphate rock and superphosphate consigned to the British Ministry of War Transport moved for export to England under the lend-lease program for purposes of defense did not clothe those shipments with the attributes of military property moving for military and not for civil use. On the contrary, that circumstance was wholly consistent with the civilian character of the goods and an intended civil use. Yet the fact of export to England under the lend-lease program is the sole consideration advanced by Petitioner in support of the proposition that the shipments here involved fall within the exception contained in Section 321(a) of the Transportation Act of 1940.

Petitioner insistently argues that "defense" necessarily implies "military." Cf. Petitioner's Brief, pp. 20-1, 26, 33, 41-3, 67, 79, 102-3. This argument defies the fact, universally recognized when Section 321(a) of the Transportation Act of 1940 and the Lend-Lease Act were adopted, that modern warfare and defense call for combined military and civilian endeavor.* That the distinction between the contribution of the "military," on the one hand, and the "civilian," on the other, persisted in the legislative mind, as well as in reality, is inescapably shown by the language of the exception whereby it was provided that full commercial rates should not apply to transportation of military property of the United States moving for military *and not for civil* use.

The opinion of the District Court was characterized by the Circuit Court of Appeals as "so clear and its reasoning so cogent

*Cf. Bernard M. Baruch, Petitioner's Brief, pp. 96-7:

"Thus war requires that, at the very moment when productive effort is deprived of millions of men for military service the country's facilities for production must be speeded up to disgorge unprecedented volumes of supplies. *Civilian morale* becomes as important as *military morale* and it is necessary to make this cosmic change with the least practicable interference with the normal life of the nation."

Cf. also *Girouard* v. *United States*, 66 S. Ct. 826, cited in Petitioner's Brief, p. 98.

that we might well affirm the judgment below and adopt that opinion as the opinion of our Court." 152 F. (2d) 228, 229; R. 31. Regarding the branch of the case now under discussion, the District Court said (60 F. Supp. 433, 439; R. 26):

> "Fertilizer is an article of value defensively. That fact has been determined by the President and stipulated by the parties and the Court has no authority to review or inquire into such determination. But does the identity of an article as being of value or use in defense of the nation necessarily imply a military or naval and not civil use?"

Having thus posed the pivotal question in the case, and after citing definitions of the terms "military," "civilian" and "civil," the District Court continued (*Id.*, 439-40; R. 26-7):

> "Unless technically employed, language is to be given its ordinary meaning and from the definitions cited it follows that while the term 'defense' may and often does carry with it the idea of force, it does not necessarily mean the use of physical force. Upon the contrary it may, and often does mean the employment of efforts unrelated to physical force. . . .
>
> "Among other agencies of the Government created for the specific purpose of aiding in the prosecution of the war are the Office of Price Administration and the War Production Board, the underlying purpose of both being to combat financial inflation and resulting confusion on the home front. In addition to agencies of such nature, the regular civilian establishments of the Government are charged with responsibilities essentially related to the war effort. For example, upon the United States Attorney rests among other duties those of prosecuting persons charged with evading service in the armed forces and acquiring sites for training those called to such service.
>
> "It could hardly be contended that a typewriter or other supplies for use of any of those agencies is military or naval property of the United States or that it is moving for military or naval and not civil use.
>
> "If such a construction should be placed upon the Transportation Act, the words 'and not civil' would have no mean-

ing, although those words were obviously intended to have a meaning and were employed at a time and under circumstances indicating danger of war.

"I am unable to draw a distinction under the Transportation Act between the status of fertilizer moving for use by a farmer in Cornwall or a farmer in Haiti under the Lend-Lease Act, and fertilizer moving for use by a farmer in the middle west furnished by the Government under appropriate provisions of the Agricultural Adjustment Administration. All are engaged in the production of agricultural products essential for the successful prosecution of the war. All are producing with fertilizer which moved as property of the United States; all are engaged in one of the most traditional of all civilian occupations, constituting the antithesis of destructive effort and as far removed from martial activities as can be imagined, and all are working to supply their respective markets with such surplus as may be available.

"It is therefore my conclusion that the phosphate rock and superphosphate, within the meaning of the Transportation Act, was not military or naval property of the United States and was moving for civil use; that the counterclaim asserted by the Government should be dismissed and judgment should be rendered the plaintiffs in accordance with the prayer of the petitioner."

In view of the cogency of these observations, they seem to us controlling.

2. UNDER THE LEND-LEASE ACT, AS CONSTRUED AND APPLIED BY THE EXECUTIVE DEPARTMENT WITH THE FULL APPROVAL OF CONGRESS, PRODIGIOUS QUANTITIES OF CIVILIAN GOODS FOR CIVIL USE WERE DISPENSED TO FOREIGN COUNTRIES AS LEND-LEASE AID.

No principle of construction is more firmly established than that great weight attaches to the practical construction of a statute adopted and applied by the Executive Department charged with its administration. Only for the most weighty reasons will such construction be disregarded. A practical administrative in-

terpretation adopted and approved by the legislature is virtually binding upon the courts. *United States* v. *Jackson*, 280 U.S. 183, 74 L.Ed. 361; *United States* v. *American Trucking Associations*, 310 U.S. 534, 84 L.Ed. 1345; *National Lead Co.* v. *United States*, 252 U.S. 140, 64 L.Ed., 496; Annotation—Effect of Practical or Administrative Construction of a Statute on Subsequent Judicial Construction, 73 L.Ed. 322-375, where the multitudinous authorities are collected.

We think that the language of the Lend-Lease Act defining "defense articles," unaided by practical interpretation, leaves no room for doubt that assistance to foreign countries under the Act comprised aid in the form of civilian property transported for civil and not for military use. But should a doubt be entertained as to this, it will certainly be dispelled by the practical interpretation uniformly placed upon the Act by the Executive Department, with the full acquiescence and approval of Congress.

The President, at first through the Lend-Lease Administration and later through the Foreign Economic Administration, regularly dispensed to countries whose defense he deemed vital to the defense of the United States enormous quantities of non-military and distinctly civilian goods. He repeatedly so reported to Congress. And Congress, with those reports before it, repeatedly endorsed and approved the President's course, by enabling its continuance through the enactment *seriatim* of the necessary Appropriation Acts.

It has already been stated that the President was required by the Act to report quarterly to Congress his operations under the Act. His reports establish, beyond doubt or any room for dispute, that in practice the lend-lease program included export of civilian goods for civil use. Particularly apposite extracts are collected in Appendix B to this brief (p. 55). We urge them upon the attention of the Court. The Reports will be referred to herein as "First Report," "Second Report," etc. In Appendix B they are more formally identified.*

*The "Eighth Report" and the "Seventeenth Report", as referred to herein, are reports made pursuant to Presidential direction by the Lend-Lease Administrator and the Foreign Economic Administrator, respectively. It results that our references do not in all instances correspond to the numbering on the face of certain of the reports transmitted by the President to Congress.

The First Report tabulates defense articles exported in the first three months of lend-lease. This tabulation, after listing wide categories of military and naval arms and supplies, including provisions (pp. 9-11), adds, among other things (pp. 11-12): Facilities and equipment for *production,* $137,134,818.00; *Agricultural* implements, $1,258,814.00; *Roadbuilding* equipment, materials and supplies, $2,650,054.00; *Metallic minerals* (including iron and steel, copper and brass, zinc, lead, and other metals and alloys), $135,794,596.00; *Non-metallic minerals* (including nitrates and *phosphates*), $1,250,000.00; and *Petroleum and coal products,* $2,898,400.00. Most of the reports contain tabulations showing clearly that articles and materials for purely agricultural and industrial use, as distinguished from arms, munitions and military supplies to be devoted to military use, were constantly supplied in prodigious quantities under the lend-lease program.*

Not only do the reports separate lend-lease aid in terms of munitions, industrial materials, and agricultural products, but they frequently divide such aid into categories of "military" goods, on the one hand, and "non-military" goods, on the other. For example, in the Fourth Report, at page 14, there appears a table denominated: "Quantities of NON-MILITARY Goods Transferred," and among other items fertilizer is listed. In the same Report, at page 18, is found a diagram entitled: "Lend-Lease Exports—Classification of Lend-Lease Exports by *Type.*" This diagram shows: (1) *Military* Items, 29%; Foodstuffs, 34%; and Industrial Materials, 37%. Chapter 3 of this Fourth Report, entitled "Lend-Lease in Action," divides lend-lease material into classes, as follows: (1) *Military* (p. 19); (2) *Industrial* (p. 20); and (3) *Agricultural* (p. 21). In the Seventh Report, page 9, is found a chart making a like classification. The accompanying text states:

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*First Report, pp. 11-12; Second, pp. 12-13; Third, p. 10; Fourth, pp. 13-14; Fifth, p. 28; Seventh, p. 18; Ninth, pp. 24-5; Tenth, p. 12; Eleventh, p. 11; Thirteenth, pp. 10, 17, 56; Fourteenth, pp. 31, 34, 37, 41, 43, 46, 50, 54, 57; Fifteenth, pp. 9, 13, 15, 25, 31, 34, 37, 40, 45, 49; Sixteenth, pp. 11, 20, 23, 25, 30, 33, 34, 36, 58; Seventeenth, p. 28. The most frequent breakdown of lend-lease defense articles is (1) Munitions, (2) Industrial Materials and Products, and (3) Agricultural Products. As to Petitioner's contention in respect of the Lend-Lease Reports, see *infra,* p. 18, *et seq.*

> "Exports of *military* items have risen much more rapidly than exports of *non-military* items. . . . While total monthly lend-lease exports increased over six times, lend-lease exports of *military* items increased fourteen times."

Petitioner is at pains in attempting to discount the effect of the lend-lease reports.* Thus, on page 12 of its brief, Petitioner says that "civilian supplies," "military items," and "non-military goods," are terms used "elastically and for statistical reasons only." Our "main error, in reading the lend-lease reports," according to Petitioner (p. 34), is our "failure to note that the agencies administering lend-lease have been entirely flexible in using terms such as 'military items,' 'military goods,' 'non-military items,' or 'industrial materials and products,' in the senses most convenient for their own current accounting and statistical purposes, and without any intention of affecting the application of the Transportation Act of 1940 or any other statute."

Passing the arresting suggestion that practical interpretation is to be discounted because ingenuous, we point to the fact that, aside from graphic and statistical classification, the reports abound with evidence that supply of civilian goods for civil use was part and parcel of the lend-lease program. Thus, of shipments to the Netherlands East Indies, it is said in the Second Report, at page 25, that they included "a wide assortment of *commercial goods* urgently needed for the minimum existence level of this island territory cut off from its home sources of supplies." The Third Report, pages 24-6, refers to the appearance of lend-lease goods *"on the grocers' shelves and in the kitchens of Great Britain"* and to the fact that 1,300,000 *small children* were receiving, *"through maternity and child-welfare clinics and local food officers,* a regular supply of concentrated orange or blackcurrant juice, and of cod liver oil compound." The Fourth Report, page 21, points to the shipment of lend-lease machinery and

*Petitioner's Brief, pp. 12; 34-44. Petitioner insists that "non-military" categories in the reports "unquestionably" include supplies which are to be regarded as nevertheless military property moving for military use (p. 36). We do not find in the record support for this assertion; but, be that as it may, the point is that the reports unquestionably show that Lend-Lease did include civilian goods moving for civil use. As has been shown, Petitioner's case depends upon the proposition that *all* lend-lease material was military property moving for a military and not a civil use.

other equipment to fortify "the *heavy industries* and *agriculture* of our allies." In the Eleventh Report, page 7, we are told of provision through lend-lease of "raw materials and industrial equipment" which enabled the United Nations "to expand their output of finished munitions and to meet *essential civilian needs*." The same Report, pages 24, 26, 28, recounts the shipment of *seeds* for planting, and with reference to North Africa says that food was sent "to tide the *civilians* over until the 1943 crop could be harvested." Constant references are made to lend-lease material as essential for "millions of men in allied lands who . . . worked long hours in munitions plants" (Thirteenth Report, page 8); for "the British workers who built the plane" (Sixteenth Report, page 9); for "the Soviet people in the production of their own foods" (Id., p. 30); for "non-belligerent countries," which were supplied with "the minimum quantities of *consumer* and *industrial* goods required to enable them in turn to supply other commodities essential for allied war production" (Seventeenth Report, p. 9).

An aspect of the lend-lease program which demonstrates with peculiar clarity that it comprised civilian property moving for civil and not for military use was foreshadowed by the President in his letter of transmittal accompanying the Seventh Report. He there said (Seventh Report, page 5):

> "We also have another task, which will grow in magnitude as our striking power grows, and as new territories are liberated from the enemy's crushing grip. That task is to supply medicines, food, clothing, and other dire needs of those peoples who have been plundered, despoiled and starved."

Describing what had already been done, and foreshadowing the magnitude which this civilian relief and rehabilitation program was to attain under the Lend-Lease Act, the Seventh Report, at pages 24-5, states:

> "Less than a week after our landing in North Africa, the Lend-Lease Administrator was instructed, in cooperation with General Eisenhower and the State Department, to extend aid to those areas in French Africa occupied by United Nations forces.

"The policy of the United States, already announced, is to provide food, medicines, and other necessities to alleviate the hunger and suffering of the people in any territory occupied by our forces, so far as it is humanly within our power to do so. Weapons will be furnished to the armed forces of these territories to hasten the defeat of the Axis.

* * * *

"Steps have already been taken with respect to North Africa in execution of this policy. About $5,000,000 worth of *civilian goods* have been purchased for shipment to that area. Many times that amount will be procured during the coming months, to be sent as shipping space becomes available. . . . Cargoes necessary to maintain our armies in the field will have top priority on shipping, but *civilian supply* will come next on the list."

In the Ninth Report, p. 26, the North African program is elaborated. It is there shown that the Lend-Lease Administration "is working in close relationship with the Office of Foreign Relief and Rehabilitation Operations in the North African *civilian supply program,*" in order to "strengthen the *civilian front* behind the lines where famine and pestilence might seriously jeopardize our chances of success on the actual fighting lines."

Adverting to the Middle East, the Tenth Report, page 20, reads:

"Through the Middle East Supply Center we are helping to provide, both on a cash and a lend-lease basis, *supplies needed to prevent a breakdown of the civilian economy* of Iraq, Iran, Egypt, and other countries of the region. . . ."

Of especial interest to the Court in this case is the following extract from the Fifteenth Report, page 38:

"Civilian supplies shipped to French Africa under lend-lease are paid for at full landed cost. With the help of these shipments production of food and other materials needed for the United Nations war effort is being increased. *We have sent to Tunisia and Morocco, for example, equipment to increase production of the phosphate mines. The ferti-*

lizer produced by these mines is needed both for the United Kingdom's intensive food-production program and for the restoration of food production in the liberated areas of occupied Europe. Seeds, insecticides, farm tools, parts for agricultural machinery, binder twine and other supplies have been sent to increase the production in North Africa of food needed by our forces. Railroad equipment has been sent to West Africa and Equatorial Africa so that greater quantities of peanut and palm oils, cocoa, mahogany, tin, copper, jute and other strategic materials and commodities needed by the United Nations can be brought out from the interior to the coast."

It will not escape the Court that in this report we have "phosphate mines" associated solely with the production of "fertilizer"; the use of fertilizer associated, as of course it must be, solely with agriculture; and the whole embraced within the category of "civilian supplies."

In the light of the foregoing, it is difficult to perceive how there can be doubt concerning the practical construction placed upon the definition of "defense articles" found in the Lend-Lease Act. The term was construed as virtually all-inclusive. Civilian goods such as machine tools; equipment and supplies for factories; agricultural implements and supplies, including seeds, fertilizers, insecticides and binder twine; raw materials, whether vegetable or mineral; foodstuffs of every variety; shoes and civilian clothing—all these and more besides were exported under the lend-lease program for use by the civilian populations of the recipient countries in civil occupations such as manufacturing, farming and mining, or for the sustenance and relief of the inhabitants of ravished lands. Beyond question, the interpretation placed upon the term "defense article" by the Executive Department charged with administration of the Lend-Lease Act was that it included civilian property moving for civil and not military use as well as military property moving for military and not for civil use.

This construction was consistently followed. As required by the Act, the lend-lease reports were submitted to Congress. Not by silence alone did the Congress acquiesce. It repeatedly

and affirmatively approved and adopted the construction placed upon the Act by the Executive Department. At intervals throughout the period covered by the reports, and assuredly in the light of the information so clearly set forth therein, Congress appropriated for continuance of the program the staggering total sum of $66,667,498,000.*

Certainly it must be a conclusive presumption that Congress authorized the expenditure of this colossal sum from the public treasury only upon careful study and full understanding of how and for what it was being expended, as shown in reports which the Congress had itself required that the President make to it. This long series of appropriations, running in almost every instance into billions, is certainly no lesser affirmation of endorsement of the practical construction placed by the Executive Department upon the term "defense article" than re-enactment unchanged of the Lend-Lease Act itself would have been. The administrative interpretation becomes the legislative interpretation as well, and thus, under the authorities already cited, binding upon the courts.

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* I. LEND-LEASE APPROPRIATIONS TO THE PRESIDENT

First Lend-Lease Appropriation, March 27, 1941	$ 7,000,000,000
Second Lend-Lease Appropriation, October 28, 1941	5,985,000,000
Third Lend-Lease Appropriation, March 5, 1942	5,425,000,000
Fourth Lend-Lease Appropriation, June 14, 1943	6,273,629,000
Fifth Lend-Lease Appropriation, June 30, 1944	3,538,869,000
Sixth Lend-Lease Appropriation, July 5, 1945	2,475,000,000
Total	$30,697,498,000

II. LEND-LEASE TRANSFERS AUTHORIZED FROM OTHER APPROPRIATIONS

War Department:	
Third Supplemental, 1942	$ 2,000,000,000
Fourth Supplemental, 1942	4,000,000,000
Fifth Supplemental, 1942	11,250,000,000
Sixth Supplemental, 1942	2,220,000,000
Military Appropriation Act, 1943	12,700,000,000
Navy Department:	
Second Supplemental, 1943	3,000,000,000
Departments other than War:	
Third Supplemental, 1942	800,000,000
Total	35,970,000,000

* (See Twentieth Report, Table 24, page 53)

As to the effect of these reports, the Circuit Court of Appeals, 152 F. (2d) 228, 229; R. 32, said:

> "An even stronger reason against the Government's contention is the fact that the whole history and administration of the Lend-Lease Act show definitely that two separate types of assistance were contemplated: (1) military or naval; (2) civil. Nowhere is this more cogently shown than in the numerous reports of President Roosevelt to Congress on just what had been done in administering the Lend-Lease Act. On the strength of these reports, Congress continued to make further Lend-Lease appropriations and no amendment of the Transportation Act was made or sought."

And the District Court (60 F. Supp. 433, 438-9; R. 26) said:

> "In the several reports a distinction is drawn between military and non-military goods. For example, in the report of August 24, 1944, Table No. 3, appearing on page 11, is denominated: 'Quantities of Non-Military Goods Transferred,' and among other items lists fertilizer—the article with which we are now concerned. Similar instances appear at many places in the various reports and innumerable illustrations of the transfer of articles strictly for use by civilians might be shown.
>
> "It would appear that Congress adopted or approved this interpretation. The President has repeatedly reported to Congress the distribution of huge quantities of non-military and distinctly civilian goods and with these reports before it Congress has endorsed and approved this course by enabling its continuance by the enactment of the necessary appropriation acts."

At the risk of undue repetition, we emphasize again that the sole consideration advanced by the United States as bringing the shipments involved in its counterclaim within the exception contained in Section 321(a) is the circumstance that they moved over the Seaboard consigned to the British Ministry of War Transport for export to England under the lend-lease program. The foregoing analysis of the terms of the Lend-Lease Act and its approved practical application is submitted as conclusive of the inadequacy of this single consideration to override definitive proof of the agricultural character and use of the materials here involved, and thus constitute phosphate rock and superphosphate

"military or naval property of the United States moving for military or naval and not for civil use."

V.

COMMENT UPON OTHER CASES INVOLVING AN INTERPRETATION OF THE EXCEPTION CONTAINED IN SECTION 321(a) OF THE TRANSPORTATION ACT OF 1940

Subsequent to decision of the instant case and the *Atlantic Coast Line* case (No. 57) by the District Courts, decisions were rendered in three other cases involving an interpretation of the exception in Section 321(a) of the Transportation Act of 1940. In none of those cases did the facts correspond to the facts in this case. In the interest of complete presentation, we comment briefly upon them here.

The first decision was that of the District Court for the Western District of Wisconsin in *Northern Pacific Ry. Co.* v. *United States*, (Jan. 15, 1946) 64 F. Supp. 1, affirmed by the Circuit Court of Appeals for the Seventh Circuit July 8, 1946, 156 F. (2d) 346, now pending in this Court on writ of certiorari. The courts below held subject to land-grant deductions the following articles: (1) copper cable for use in insulation of degaussing equipment (to neutralize magnetic mines); (2) lumber for construction of a munitions plant; (3) lumber for construction of pontoons; (4) bowling alley equipment for recreational use, initially by civilian employees, but later by military personnel; and (5) liquid paving asphalt for construction of runways at an airport. Whatever disposition be made of that case in this Court, it is clear that the instant case, involving, as it does, lend-lease material exported to Great Britain for agricultural use, is a wholly different case.

This was recognized by both the District Court and the Circuit Court of Appeals in the *Northern Pacific* case, the latter court saying, 156 F. (2d), at page 350:

> "Counsel cites Powell v. United States, D. C., 60 F. Supp. 433; Id., 4 Cir., 152 F. 2d 228. In this case the United States had shipped phosphate to the British Ministry of Transport to be sent under lend-lease to Britain to be used by farmers

there as fertilizer. The Court found that lend-lease goods were divided into three classes: (1) military, (2) industrial, and (3) agricultural. The use here was agricultural and civil as distinguished from military and naval."

It is thus apparent that the court there had no fault to find with the decision below in the instant case, and that the cases are different.

The second decision was *Southern Pacific Company* v. *Defense Supplies Corporation*, (Jan. 21, 1946) 64 F. Supp. 605, now pending on appeal to the Circuit Court of Appeals for the Ninth Circuit. There it was held that shipments by Defense Supplies Corporation to itself of benzol to be manufactured into aviation gasoline and tires for use by the armed forces was military property moving for military use, within the meaning of Section 321(a). It will be noted that in the opinion of the District Court in that case the words "military" and "naval," and by the same token the word "civil," as used in Section 321(a), are to be understood as descriptive, not alone of the nature of the property itself, but also of the nature of its contemplated use (64 F. Supp., at p. 607). The court was of opinion that the relationship of the transportation of the benzol "to the physical force of conflict and combat was actual and proximate" (*Id.*, p. 608).

Whatever may be thought of the decision in the *Southern Pacific* case, clearly it is without bearing upon the instant case. For here the property was lend-lease fertilizer for agricultural use and there is a complete absence of actual and proximate relationship to the physical force of conflict and combat. That the instant case was brought to the attention of the court in the *Southern Pacific* case appears from the court's reference to this case in a footnote (*Id.*, p. 608). The fact that the instant case was not discussed indicates that the court there correctly concluded that the cases do not bear the one upon the other.

The remaining case is *Southern Pacific Co.* v. *United States*, Court of Claims No. 45952, No. 46012, decided October 7, 1946, not yet reported. It was there held that lend-lease shipments of motor vehicles, spare parts, etc., under consignment to Chinese

Defense Supplies, Inc., upon requisition made by the Republic of China, under the lend-lease arrangement, as for "Army use," moved subject to land-grant deductions. That requisition contrasts with the requisition in the instant case, which called for phosphate fertilizers to be imported and distributed to effectuate Great Britain's revised agricultural program (R. 15). According to the opinion of the Court of Claims, no question as between civil and military use was there presented, but rather the question whether disposition to a foreign government constituted "use" within the meaning of the statute. On this point, the Court of Claims cited the opinion of the District Court in the instant case, on a point perhaps not necessary to the decision, as follows:

> "In *Powell* v. *United States*, 60 Fed. Supp. 433, 437, affirmed on appeal, 152 F. (2d) 228, a case under the same statutory provision, but involving shipments of phosphate rock and superphosphate, ultimately destined to Great Britain for agricultural purposes, the District Court, by Judge Hutcheson, propounded two questions to be answered, the first, whether under the Transportation Act of 1940 the phosphate rock and superphosphate were military or naval property of the United States, and second, whether it was moving for military or naval and not for civil use. As to the second question the Court said:
>
> > 'The second question does not involve a consideration of of the nation by which the property might be put to military or naval use. Such use of the property by a power other than the United States would seem to be such military or naval use as would be sufficient for the requirement of the Act.'
>
> "With this conclusion we agree."

It is manifest that the *Southern Pacific* case in the Court of Claims is to be distinguished from the instant case and that, whatever may be thought of the conclusion reached by the Court of Claims, its decision is without bearing here.

VI.

PETITIONER'S BASIC CONTENTION

It is fair to say that the argument advanced on behalf of Petitioner comes down to the proposition that, because of the character of modern warfare, all material furnished to a belligerent country in the interest of the defense of the United States was necessarily "military or naval property" destined for "military or naval and not for civil use"—and this without regard to the nature of the article supplied or the character of its intended and actual use. (Cf. Petitioner's Brief, pp. 32-3, 40-1; 44; 79.) Only from so extreme a position could it be argued with even a show of plausibility that agricultural fertilizer for use by the farmers of Great Britain constituted military property for military as distinguished from civil use.

Our position, in answer, is that agriculture in belligerent Britain was no more a military calling than agriculture in belligerent America; that fertilizer for the British home front was no more a military commodity than fertilizer for the American home front; that total war no more extinguished the distinction between the civilian and the military in England than it did in America; that it would occur to no one to classify farming in this country, even in times of total war, as a military undertaking; that it would be sophistry to hold enrichment of English soil a military end, but enrichment of our own lands a civil objective.

It will not do to seek a distinction, as Petitioner inferentially does (Petitioner's Brief, p. 49), in the extremity of England's need. It cannot be forgotten that needs of an urgent character developed in our own country. But at all events an extreme need in respect of fertilizer for farming is no less a home-front requirement of a civilian character than would be a more moderate need. Wars may be won or lost on the home front, but the home front remains the civilian as distinguished from the military front. Small wonder, then, that the District Court was "unable to draw a distinction under the Transportation Act between the status of fertilizer moving for use by a farmer in Cornwall or a farmer in Haiti under the Lend-Lease Act, and fertilizer moving for use by

a farmer in the Middle West furnished by the Government under appropriate provisions of the Agricultural Adjustment Act."

VII.

PETITIONER'S CONTENTION FOR A LIBERAL CONSTRUCTION OF THE EXCEPTION IN SECTION 321(a)

In its Brief (pp. 16, 103-6) Petitioner insists that Section 321(a) was not remedial legislation but was, on the contrary, a relinquishment of a preexisting right partaking of the nature of a new grant without consideration, and thus related to a bounty. Therefore, Petitioner argues, the scope of the partial repeal of land-grant rates effected by Section 321(a) should be strictly construed and the exception of military property for military use liberally construed. Petitioner relies, for authority, upon *Southern Pacific Co.* v. *United States*, 307 U.S. 393, *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, *Slidell* v. *Grandjean*, 111 U.S. 412, and *Southern Ry. Co.* v. *United States*, 322 U.S. 72.

But the history of land-grant rates, now to be discussed, establishes unmistakably that the legislation was in fact remedial, and that the abolition of land-grant rates subject to the exception of military property for military use was based upon consideration moving from the railroads to the United States. No element of bounty was involved, and the remedial measure calls for a liberal construction. From this it follows that the exception of military property for military use should receive a narrow construction.*

THE HISTORY OF LAND-GRANT RATES.—Between the years 1850 and 1870, the United States granted public lands to a number of railroads in the west and south. The land was unsettled. The policy underlying the grants was to encourage the building of railroads in these unsettled areas.

*On page 106 of its Brief, Petitioner suggests that "it may well have been an accident of draftsmanship and of the legislative course of the statute that Section 321 cast its provision concerning 'military or naval property' in the form of an exception rather than as main text." This is a wholly unjustified attempt to rewrite the Act of Congress. Obviously, the retention of land-grant deductions in respect of military property for military use was properly framed as an exception to the abolition of land-grant rates in respect of all other property.

The construction of portions of the Seaboard's line in Florida was aided by land-grants to certain of its predecessor corporations, through grants by the United States to the State of Florida, which in turn granted the land to the railroad corporations. The original grant to Florida was made for construction of a main line from Fernandina to Tampa Bay and a branch line from Waldo to Cedar Key. The grant contained, *inter alia*, the following condition:

> ". . . the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States." Act of May 17, 1856 (Section 3) (11 Stat. 15).

A like condition was imposed by the terms of grants of public lands to other railroads.

In *Lake Superior & Mississippi Railroad Company* v. *United States*, 93 U.S. 442, this condition was construed as conferring only the free use of the railroad roadbed as a highway, the Court saying:

> "We are of the opinion that the reservation in question secured to the Government only a free use of the railroads concerned, and that it does not entitle the Government to have troops or property transported by the companies over their respective roads free of charge for transporting the same."

Following this decision, the Court of Claims held that a fifty per cent reduction in rates should be made by reason of the right of the Government to use the roadbed free of charge. *A. T. & S. F. R. R. Co.* v. *United States*, 15 Ct. Cl. R. 126. Somewhat later, Congress enacted a statute providing that land-grant rates should be such as the Secretary of War deemed just and reasonable, not exceeding fifty per centum of the full commercial rates. Act of June 7, 1924, c. 291, Title I, 43 Stat. 486; 10 U.S.C.A. §1375. In conformity with this statute, the land-grant railroads, up to the time of enactment of Section 321(a) of the Transportation Act of 1940, transported over the land-grant portions of their

lines at half rates *all* property of the United States. Competing lines of railroad, e.g. the Atlantic Coast Line, in order to participate in the traffic, entered into so-called "equalization agreements" to meet the land-grant rates.

During the decade 1930 to 1940, the United States became engaged in a wide variety of relief measures, and various corporations were organized by the government for relief purposes. These governmental agencies became important shippers by rail of a heavy volume of diversified civilian goods. Such shipments, under the Land-Grant Acts and the equalization agreements, were entitled to move at one-half the commercial rates. Inasmuch as this class of material was of a kind not in contemplation when the original Acts were adopted, the result was clearly unjust. The railroads sought legislative relief. (See testimony of R. V. Fletcher, Vice-President, Association of American Railroads, before subcommittee of the Senate, 78th Congress, Second Session, on H. R. 4184, a bill to repeal land-grant rates, pages 15 to 19).

On March 17, 1938, the President appointed a committee, made up of the then Chairman of the Interstate Commerce Commission and two other members of the Commission, to bring forward specific recommendations for dealing with the railroad situation. On March 24, 1938, that committee submitted to the President a report which he formally transmitted to Congress, and which was printed as House Document No. 583 of the 75th Congress, Third Session. The committee's recommendation relating to land-grant deductions was as follows:

> "For many years land-grant reductions, usually 50 per cent of the revenue accruing to that portion of the line which is Government aided, have been made on Government traffic. Through an equalization arrangement competing roads make the same reduction on Government traffic in order to participate in the business. The reduction on this account for 1937 is estimated at $7,000,000. For the most part it affects roads in the western district where as above noted, financial conditions are worst. The increase in Government shipments in recent years has made this reduction from the normal rates assume important proportions. No good reason appears why such reduction should continue. After all, the country

must support whatever transportation system it uses. The Government, as a shipper, may well pay reasonable rates. We recommend appropriate amendments to existing statutes to remove the requirement for land-grant reductions."

Subsequently, on September 20, 1938, the President appointed another committee made up of three railroad executives and three railway labor executives to consider the transportation problem and recommend legislation. This committee was known as the "Committee of Six." Its report likewise recommended abolition of land-grant deductions, in the following language:*

"Certain statutes by which grants of land were made by the Government in aid of the construction of 17,627 miles of railroad in pioneer days stipulate that the Government shall forever have the use of such roads for the transportation of troops and property of the United States free of any toll or charge. Early in the history of these acts the Supreme Court construed them as not contemplating free transportation service for the Government but only free use by it of these roads in performing its own transportation service. It further found that about 50 per cent of the total railroad costs was incident to the provision and maintenance of the roadway and tracks and so established 50 per cent of the normal commercial rate as the proper basis of charge to be made by the railroads for transportation services performed by them for the Government over land-grant lines.

"Routes in competition with those containing land-grant mileage must meet the reduced rates of the latter on through Government traffic. The total so-called land-grant reductions in rates on Government traffic, including mail, now amount to about $10,000,000 per year. There are now 69 different agencies and departments of Government which receive the benefit of these reduced rates, and the number is constantly increasing. This traffic has grown to a volume far in excess of anything that could possibly have been in contemplation of the parties at the time the land grants were made. The Government received more than full consideration for the lands granted in the enhancement in value of the adjoining

*Hearings, 76th Congress, House Committee on Interstate and Foreign Commerce, H. R. 2531, Vol. I, pages 259-308, at pages 271-2.

lands retained by it which resulted from the construction of the railroads, to say nothing of the amount already received by it in the way of reduced transportation charges.

"The Government should recognize the inequity of requiring transportation for itself at rates below those fixed by one of its own regulatory agencies as reasonable for application to its citizens.

"We therefore recommend the repeal by the Congress of the reduced rate provisions of these land-grant statutes."

In 1938, there was introduced in the 75th Congress a bill (H.R. 10620) to repeal land-grant rates. In the course of hearings held by the House Committee on Interstate and Foreign Commerce, May 31, 1938, to June 2, 1938, Lt. Col. Carl Halla, Finance Department, General Staff, United States Army, speaking for the War Department, presented an official report prepared by the War Department for presentation to the Committee. In part, this report read (pp. 16-17 of Report of Hearings):

"When the land-grant agreements were entered into, the majority of Government property shipped throughout the United States consisted of property, rations, uniforms, and equipment of the armed services. Today this situation has materially changed and agencies of our Government have entered into activities which require them to ship as Government property all classes of supplies and materials, including hogs, cattle, wheat, butter, eggs, forest service supplies, construction materials used to further general employment. The increase in Government shipment in recent years has made the land-grant deduction benefits assume enormous proportions.

"While it is agreed that the nation must support whatever transportation system is required and is desired to be continued, it is the view of the War Department that no injustice would arise if the railroads are required to continue under present agreements to transport troops and *supplies for military and naval services* at reduced rates. However, there appears to be no good reason why the railroads should be required to transport at reduced rate classes of property not foreseen or anticipated when the original agreement was entered into.

"For the reasons stated above the War Department can see no objection to the provisions of the proposed legislation if the Bill is amended to include the following additional provision:

"On line 7 after the word 'government' insert 'except such provisions as require reductions in the compensation received for the transportation of men, officers, or personnel in any branch in the military or naval service, and military or naval property.' "

So far as we have been able to ascertain, this War Department report originated the thought of an exception in favor of "military or naval property." The 75th Congress did not enact the bill, but at the following session Section 321 was enacted and incorporated into the Transportation Act of 1940. The hearings immediately preceding the enactment are without particular bearing here,* except that the Committee was referred to the record of the previous hearings, including the report of the War Department presented by Lt. Col. Halla. That report makes it clear that in suggesting an exception retaining land-grant deductions in respect of "military or naval property" the War Department had in mind "supplies for military and naval services," and nothing more. (Cf. Mr. Pearson's comments quoted at p. 61 of Petitioner's Brief.)

Far from being without consideration and in effect a bounty, the partial relinquishment by the United States of the right to land-grant deductions was in fact supported by substantial and adequate consideration. Section 321(b) of the Transportation Act of 1940 conditioned the applicability of Section 321(a) upon release by the railroads of all outstanding claims to lands, in the following language:

"(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such

*Cf. Petitioner's Brief, pp. 65-6.

carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from September 18, 1940."

The substance of the consideration provided for by this requirement of release is clearly shown in the testimony of Mr. Fletcher at the aforementioned hearings on H. R. 4184. Those hearings were conducted during June and August of 1944. On page 20 of the printed report of the hearings, Mr. Fletcher made the following statement in answer to a question from Senator Austin:

"Now, that act provided, I should say, that any railroad that desired to take advantage of this provision in the 1940 act, this section 321, should grant back to the Government any lands which had not actually been patented to those railroads, and which had not been reduced to possession so to speak. As a matter of fact, there were many millions of acres of land which were the subject of dispute between the Government and the railroads, and lawsuits were pending in the courts throughout the country, and applications for patents which had been held up for one reason or another. All of the railroads that had received grants and had claims of this character released those claims in order that they might qualify to secure the full domestic, commercial rates on civilian traffic."

On the same page, in answer to questions from Senator Stewart, Mr. Fletcher testified:

"Senator Stewart: Yes. Now you say a great many railroads undertook to avail themselves of that?

"Mr. Fletcher: All of them did. All of the land-grant railroads that had any claims whatever filed releases with the Government relinquishing any claims to that land.

* * * *

"Senator Stewart: You can compile that information and put it into the record?

"Mr. Fletcher: Well, I think I can give it to you in summary fashion pretty well.

"Now, here is a statement made by the Secretary of the Interior after there had been concluded all of these arrangements for the surrender by the railroads of their claims to the land not patented. Under date of April 20, 1941, the Secretary of the Interior issued this public statement:

"' 'More than 8,000,000 acres of land in 11 Western States—an area larger than the war-stricken Netherlands—have been restored to Federal ownership with the completion of 6 months' work in closing out early railroad land grants, Secretary of the Interior Harold L. Ickes said today in announcing his approval of a formal release submitted by the Northern Pacific Railroad Co., of all further claims under its grants made in 1864 and 1870.

" 'Under the terms of the Northern Pacific release—the last and largest of the historic railroad land grants closed out by the General Land Office in accordance with provisions of the Transportation Act of 1940—approximately 4,500,000 acres of land in Washington, Montana, Idaho, Oregon, North Dakota, Minnesota, Wisconsin, and Wyoming will revert to the Federal ownership for administration under the conservation program of the Department of the Interior.

" 'Releases previously approved by the Secretary resulted in the restoration to the public domain of approximately 2,000,000 acres of land in Southern California by the Southern Pacific, and 1,600,000 acres in Arizona and New Mexico by the Atchison, Topeka & Santa Fe Railroad. The value of the land is unappraised.

" 'In addition to its relinquishment of claims to the grant lands, the rights of the Northern Pacific to timber-

cutting contracts on 3,600 acres in Washington, and telephone, pipe line, rights of way, and other permits and licenses on 1,200 acres in Minnesota, Montana, Washington, and Wyoming, also have been assigned to the Federal Government.'"

Further, on page 21, Mr. Fletcher made the following statement in answer to a question from Senator McFarland:

"Mr. Fletcher (reading):

" 'Approval of the release also makes possible the termination of a 10-year lawsuit between the Government and the railroad company—'

he means now the Northern Pacific— ':

" 'based on the terms of the land grant totaling 43,159,000 acres made to the company and its predecessors more than three-quarters of a century ago.'

"Somewhere or other, the distinguished Secretary of the Interior stated that this was the greatest real estate transaction in history, as I have no doubt it was."

It thus clearly appears that the relinquishment by the United States of land-grant deductions from commercial rates on civilian property was conditioned upon the release of all claim by the railroads to some 8,000,000 acres of land which reverted to the public domain, the release constituting, according to the Secretary of the Interior, the greatest real estate transaction in history.

In addition to the fact that the partial abolition of land-grant rates provided for in Section 321(a) was supported by substantial consideration under the release provision contained in Section 321(b), there is the further fact, developed by the "Committee of Six" (see *ante*, pp. 31-2), that the United States "received more than full consideration for the lands granted in the enhancement in value of the adjoining lands retained by it which resulted from the construction of the railroads, to say nothing of the amount already received by it in the way of reduced transportation charges."

In view of the foregoing, we respectfully submit that the rule of construction urged by Petitioner on brief and founded upon the conception of Section 321(a) as a bounty without consideration is not applicable here.

A graphic demonstration of the remedial character of legislation to abolish land-grant rates* is found in the circumstance that abolition of those rates was strongly urged by the Interstate Commerce Commission and by the shippers of the country, in order to put an end to discrimination inherent in the arrangement. Thus, when a subcommittee of the Senate Committee on Interstate Commerce had under consideration H. R. 4184, abovementioned, Commissioner Mahaffie submitted a letter from the legislative committee of the Interstate Commerce Commission which read in part as follows:**

> "The Commission is also interested in the effect of the land-grant law on shippers. In the hearings before the House Committee on Interstate and Foreign Commerce many examples of distortion of normal rate relations by the land-grant rates were disclosed. These play a prominent part in influencing the ability of producers to compete for Government contracts. The situation is aggravated by the inability of shippers to ascertain what the land-grant rates are from either their own points of production or those of their competitors, since these rates cannot be found in tariffs open to inspection, . . .
>
> "It is well recognized that the requirement that the rates of common carriers be a matter of public knowledge is essential to the discovery and prevention of the discrimination and undue prejudice and preference which are declared unlawful by the Interstate Commerce Act. It is anomalous that the Federal Government, which is responsible for the legislative policy embodied in that act, should countenance a system of rates applicable to its own property not in accord with that principle in disregard of the duty to protect shippers from unlawful inequalities."

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*Cf. Petitioner's Brief, pp. 64-5, footnote 31.

**Hearings, Subcommittee of the Senate Committee on Interstate Commerce, 78th Congress, H. R. 4184, pp. 8-9.

In the course of the same hearings,* John B. Keeler, President of the National Industrial Traffic League, a national organization of shippers with members scattered practically throughout the United States, said:

> "The point I would like to leave with you gentlemen is this: that the shippers of this country are solidly back of this bill, practically 100 percent. I have sat in meetings of different shipping organizations throughout the country, have heard the debate on this question, and know that they are very, very strongly in favor of the passage of the bill. In fact, shippers started agitation for the repeal of land-grant rates before the railroads became active in the matter.
>
> "The interests of shippers arise in two ways principally:
>
> "1. Because of the discrimination inherent in these rates a shipper located on a non-land-grant road competing with a shipper located on a land-grant road is at a distinct disadvantage in competing with the shipper who gets the benefit from the Government when receiving land-grant rates. Also, shippers are unable to ascertain what land-grant rates are in effect. If a shipper goes to any Government department seeking information on the question he is informed it is not the policy of the Government to give out information with regard to land-grant rates. As a consequence, in competing on Government business a person is competing in a blind way. People do not know what their competitors have to pay. That situation has resulted in general disfavor upon the part of shippers, I mean with regard to land-grant rates.
>
> "2. Next, the general interest of the shipper is that to the extent the Government fails to pay its fair share of the transportation burden other shippers have to pay higher rates than would otherwise be the case. In other words, to the extent that the Government fails to pay its fair share of the transportation burden the general shipping public has to make up the difference."

Like illustrations could be multiplied, but the foregoing suffice

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*Hearings, Subcommittee of the Senate Committee on Interstate Commerce, 78th Cong., H. R. 4184, pp. 4-5. Congress did not enact H. R. 4184, but in the 79th Congress land-grant rates were finally abolished through enactment of H. R. 694, Pub. No. 256.

to show the remedial nature of legislation such as Section 321(a), which abolished land-grant deductions in respect of all government property except military property for military use.

This Court has frequently emphasized the rule that an exception contained in a remedial statute should be strictly construed and should be interpreted so as not to destroy the remedial processes intended to be accomplished by the enactment.

The leading case is *Spokane & I. E. R. Co.* v. *United States*, 241 U.S. 344, 350, 36 S. Ct. 668, 671, 60 L. Ed. 1037. That was an action by the United States to recover penalties for violation of the Safety Appliance Act. The defense was that the cars involved were operated over street railway tracks from the stations in Spokane to the yards of the company, and were therefore "used upon street railways," within the meaning of an exception rendering the requirements for safety appliances inapplicable to cars so operated. The operation, however, was continued over the interurban section of the railroad, to which the Act would apply. This Court held that to sustain the defense would require an unwarranted extension of the meaning of the exception and would tend to defeat the purpose of the Act. The Court said (p. 350):

> "But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment."

The principle thus enunciated has been followed in numerous cases.

Piedmont & Northern Rwy. Co. v. *Interstate Commerce Commission*, 286 U.S. 299, 311, 312, 52 S. Ct. 541, 545, 76 L. Ed. 1115, is peculiarly in point. It involved the interpretation of an exception contained in the Transportation Act of 1920. The court held that the Transportation Act of 1920 was remedial legislation and that therefore the exception should be strictly construed. The specific question was whether the Act required the Piedmont & Northern, an electric railway, to secure the authority of the Interstate Commerce Commission before undertaking an extension of its line. The applicable provision in the Transportation Act

contained an exception in the case of electric and suburban railways. Holding the Commission's authorization to be required, this Court said:

> "The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam carriers, and competes with steam trunk lines in such manner, that, in view of the declared policy of the act we cannot hold it an 'interurban' railway within the exemption of the same paragraph. *The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.' Spokane & I. E. R. Co.* v. *United States,* 241 U.S. 344; 60 L.Ed. 1037, 36 S.Ct. 668."

In *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 83 L.Ed. 164, and *Gregg Cartage Co.* v. *United States,* 316 U.S. 74, 83, 62 Sup.Ct. 932, 86 L.Ed. 1283, this Court placed a narrow construction upon exceptions contained in the Motor Carrier Act of 1935.

The case of *Pennsylvania R. Co.* v. *United States,* 54 F. Supp. 381; decided by a three-judge court consisting of Soper, Circuit Judge, and Coleman and Chesnut, District Judges, involved construction of the Transportation Act of 1940. The court held that the Act was remedial legislation and that exceptions from its broad purpose and intent should be strictly construed, saying (p. 390):

> "Finally, we feel we scarcely need say more to make it clear that the Transportation Act of 1940 is very broad, remedial legislation. For this reason, as the Supreme Court has said about the Transportation Act of 1920, it should be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.' *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission,* 286 U.S. 299, 311, 312, 52 S. Ct. 541, 545, 76 L. Ed. 1115. See also *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 83 L.Ed. 164; *Gregg Cartage Co.* v. *United States,* 316 U.S. 74, 83, 62 S.Ct. 932, 86 L.Ed. 1283."

The foregoing cases and the history of land-grant rates demonstrate that the Transportation Act of 1940, as a whole *and as abolishing land-grant deductions,* was remedial legislation. In respect of land-grant repeal, its primary purposes were clearly remedial—namely, relief for the railroads from recognized hardship and injustice and an end, *pro tanto,* to discrimination. This Court, accordingly, in applying the exception upon which the United States relies, should construe the same strictly and confine its application to what is "military or naval property of the United States moving for military or naval and not for civil use" in the narrowest sense of the words used.

THE AUTHORITIES RELIED UPON BY PETITIONER. —As stated, Petitioner relies upon *Southern Pacific Co.* v. *United States,* 307 U.S. 393, *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, *Slidell* v. *Grandjean,* 111 U.S. 412, and *Southern Ry. Co.* v. *United States,* 322 U.S. 72, in support of its contention for a liberal interpretation of the exception in Section 321(*a*): Cf. Petitioner's Brief, p. 104. It remains, in answer, to add a word regarding those cases.

Southern Pacific Company v. *United States* and *Great Northern Ry. Co.* v. *United States* announce the familiar doctrine that relinquishment of a public right is ordinarily to be construed liberally in favor of the Government and strictly against the donee. The reasons upon which this doctrine rests are made clear in *Slidell* v. *Grandjean,* and, as we shall show, they are inapplicable in the instant case.

The *Slidell* case involved a determination of the extent of a grant of public land to a private individual, apparently without consideration as to the portion in dispute. This Court referred to the "familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual." The Court stated that the reason for the rule is to be found in the circumstance that such acts are

usually drawn by the interested parties, who will be presumed to claim all they are entitled to. "The rule," said the Court, "is a wise one; it serves to defeat any purpose concealed by skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

In *Russell* v. *Sebastian,* 233 U.S. 195, 205, 58 L.Ed. 912, 921, 922—a case involving the extent of a public utility's right to lay gas and water mains in city streets pursuant to acceptance of an offer tendered by constitutional provision—Mr. Justice Hughes, after stating the principle of the *Slidell* case, commented as follows:

> "But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey (citing cases). Here, the provision was presented by a constitutional convention for adoption by the people as the deliberate expression of the policy of the state in order to secure the benefits of competition in public service, and it will not be questioned that it must receive, as the state court said in *People* v. *Stephens,* 62 Cal., p. 233, 'a practical, common-sense construction.'"

The reason behind the doctrine of the *Slidell* case, as stated in that decision itself and reiterated by the Chief Justice in *Russell* v. *Sebastian, supra,* is the circumstance that a statute operating as a public grant to a private person is ordinarily drawn by the donee, who will be presumed to claim in no uncertain terms all he is entitled to. The reason for the rule is wholly absent in the present case, and the rule itself is therefore without application. The language in Section 321(a) which benefits the carriers is the explicit provision that

> "Notwithstanding any other provision of law * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any property for the United States, or on its behalf."

It will not be denied that this language, standing alone, explicitly abolishes any and all land-grant deductions. If it be

attributed to carrier authorship, it unmistakably covers all that to which the carriers could be entitled in the premises. The ensuing language of Section 321(a), embodying the exception whereby land-grant deductions are preserved in respect of military property moving for military and not for civil use, is, on the other hand, distinctly not designed for carrier benefit. Its authorship is not to be attributed to the carriers. It apparently originated with the United States (see *ante*, pp. 32-3). On the theory of the *Slidell* and like cases, it should be construed strictly against the United States as being of its authorship and for its benefit. The United States should be taken to have clearly provided the full extent of the exception. Therefore, should there be found an ambiguity, it ought to be resolved against the United States. For certainly the prime motive in the enactment of Section 321(a), and its dominating purpose, was to relieve the railroads of the burden of half-rates for the United States. The exception should not be permitted to defeat the principal purpose in mind, as would surely result in time of national peril or war under Petitioner's contention. Such, in the words of Chief Justice Hughes, is the "practical common-sense construction."

Southern Ry. Co. v. United States, supra (cited by Petitioner, Brief pp. 53, 55, 104, 108), involved the interpretation of an equalization agreement entered into between the Southern Railway and the United States. The contract expressly entitled the United States to "the lowest net rates lawfully available, as derived through deductions account of land-grant distances from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement." The question was whether or not the United States was entitled to compute the deduction on the basis of land-grant distances via a circuitous as opposed to a more direct and more practicable land-grant route. It was held that the United States might calculate upon the more circuitous distance, because that would produce "the lowest net rate lawfully available." The Court pointed out that certain other equalization agreements expressly excluded the use of circuitous land-grant mileage and that for it, by construction, to supply that provision in the particular agreement under consideration would be to remake rather than to interpret the

contract. Thus the case was simply one where the Court declined to modify a contract through construction. It is not apposite here.

VIII.

THE CIRCUMSTANCES SURROUNDING THE ENACTMENT OF SECTION 321 (a), AND THE SIGNIFICANCE OF THE WORDS "AND NOT FOR CIVIL USE."

As we have sought to show, there is implicit in Petitioner's argument the proposition that conditions of total war operate to obliterate any distinction between what is civil, on the one hand, and military, on the other. Our reply is that total war emphasizes rather than obliterates the distinction. At all events, it is certain that Congress in the enactment of Section 321(a) of the Transportation Act of 1940 regarded the distinction as a continuing one and expressly provided that it be given effect. No other conclusion would allow any significance to the phrase "and not for civil use." This aspect of the case was dealt with by the District Court, as follows (60 F. Supp. 433, 438; R. 24-5):

> ". . . It is urged that in waging modern warfare all resources of a country are mobilized and articles heretofore considered as non-military assume such character in conducting what has been termed 'total war.' England has been likened to a besieged fortress and it is contended that such assistance as was rendered that country was assistance in carrying on the war in a military sense. . . .
>
> "This line of reasoning, if followed to its logical conclusion, would obliterate any distinction between the civilian and the military in time of war.
>
> "In adopting the language of the Transportation Act, Congress recognized a distinction between military or naval property and other property of the Government and it recognized the distinction between military or naval property moving for military or naval use and such property for civil use. As has been pointed out, the Act was passed at a time when there existed a threat of involvement of this country in total war on a world-wide stage, the serious nature of which is realized when it is recalled that the threat resulted in an accomplished fact within less than fifteen months from

the time Congress acted. The United States along with the world, was a close observer of the methods of waging 'total war' and Congress was fully aware that modern wars engage the full resources of belligerent nations. Nevertheless, the Act clearly recognizes the distinction between the civil and the military. Appropriate language might have been used basing the exception upon the existence of a state of war, but this was not done."

In the same connection, the Circuit Court of Appeals said, 152 F. (2d) 228, 229; R. 31-2:

"The Transportation Act was passed before the Lend-Lease Act. Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale. Yet, with this picture before it, we must presume that Congress deliberately used the words 'military or naval' in their generally accepted meaning. And we cannot accept Government's statement that the words 'not for civil use' in the Transportation Act were mere surplusage. On the contrary, we think those words clearly show a distinction (however difficult in practice) between the military or naval on the one hand, and the civil on the other hand. Had this not been the Congressional intention, appropriate words for that purpose were readily available."

We submit that there is no escape from the logic of the opinions below and that Petitioner's position is not tenable.

IX.

PETITIONER'S ARGUMENT BASED UPON THE LAW OF CONTRABAND

In Petitioner's Brief, pp. 45-8, the attempt is made to bolster the case for the United States by reference to the law of contraband. Regardless of the extent to which the concept of contraband may have expanded as modern war has come to involve the civilian population and civilian occupations as well as the military establishment, no light is shed upon the question here before the Court.

As the home front acquired the degree of importance attaching to it in modern warfare contraband may have come to include commodities essential to civilian subsistence and civilian occupations. If agricultural fertilizer destined to an enemy country would properly be deemed contraband, by the same token so would anything else deemed helpful to the enemy, whether for civilian or military use. We submit, therefore, that Petitioner's resort to the contraband concept clearly begs the question in this case. Admittedly the fertilizer was useful in Britain's war effort. But the question is not whether the fertilizer would aid England, but whether its use was civil or military. On this point the law of contraband sheds no light whatever.*

X.

PETITIONER'S ARGUMENT BASED UPON THE LEGISLATIVE HISTORY OF LAND GRANT REPEAL

Petitioner (Brief, pp. 75-79) seeks to draw support from Congressional unwillingness to abolish the land grant rates preserved by the exception in Section 321(a) until hostilities ended. But it does not follow from retention of land grant rates during the war on "military or naval property of the United States moving for military or naval and not for civil use" that Congress contemplated application of land grant deductions to the movement of agricultural property for agricultural use. Patently, we have here a *non sequitur*. The argument begs the question in the case.

A correlative argument is advanced on page 83 of Petitioner's Brief, where it is said that "a basic purpose of Congress, in enacting Section 321(a), was to continue the railroads' land-grant obligations for national defense purposes." As related to the con-

*In a footnote to its argument based upon the law of contraband, Petitioner (Brief, p. 45) notes that "phosphates are also a key ingredient in the production of many types of munitions, including tracer bullets and flares, grenades and bombs." It is difficult to perceive the point of this note in view of the agreed and conclusive showing of intended and actual agricultural use of the shipments here involved. The District Court, not to be confused, said in this connection (60 F. Supp. 433, 437; R. 23):

> "While phosphate rock and superphosphate may be used for various purposes, it is stipulated that the shipment here involved was destined for use as agricultural fertilizer supplied to farmers in Great Britain under the Lend-Lease Act * * *."

ception of "national defense" embodied in the Lend-Lease Act, this assertion is entirely unfounded. Here, again, Petitioner begs the question. Moreover, as already shown, *ante* pp. 44-5, the circumstances surrounding the enactment of Section 321(a), and the express exclusion of land-grant deductions on property moving for "civil use" show conclusively that Congress did not contemplate a latitudinarian interpretation of "military property" moving for "military use."

XI.

SUMMARY

The case for respondents may be briefly summarized as follows:

1. There is no dispute as to the validity of the claim sued upon. The only defense asserted is by way of counterclaim. The counterclaim rests upon the proposition that certain shipments over the Seaboard of phosphate rock and superphosphate which moved for export to England under the lend-lease program were entitled to land-grant deductions from the full commercial rates. The respondents deny that the shipments in question were entitled to move subject to land-grant deductions.

2. Land-grant deductions originated by way of condition upon governmental grants of land from the public domain. With passage of time the railroads, through land-grant deductions from commercial rates, paid many times over for the land granted. In the light of this consideration, coupled with unanticipated growth in the volume and variety of governmental rail shipments and aggravation of the discrimination involved, the inequity of continued insistence upon reduced rates for governmental traffic became apparent. Accordingly, Section 321(a) of the Transportation Act of 1940 was enacted. It abolished land-grant deductions in respect of all governmental traffic, excepting only shipments of "military or naval property of the United States moving for military or naval and not for civil use." It is agreed that the shipments of phosphate rock and superphosphate there involved were, at the time of their transportation over the Seaboard, property of the United States. Therefore, the issue in

this case comes down to the question whether or not such shipments constituted "military or naval property" of the United States "moving for military or naval and not for civil use," within the meaning of the exception contained in Section 321(a) of the Transportation Act of 1940.

3. The burden of proof to sustain its counterclaim rests upon the United States. 31 C. J. S. 714. Overall relief from the burden of land-grant deductions was a remedial measure, to be liberally construed. Therefore, the scope of the exception whereby such relief was denied in respect of military property of the United States moving for military and not for civil use is to be narrowly construed against the United States.

4. The only proof in support of the counterclaim is the stipulated fact that the shipments of phosphate rock and superphosphate moved for export under the lend-lease program. As to both the phosphate rock and the superphosphate, it is stipulated that they were requisitioned, transported, exported and used as agricultural fertilizer, in aid of Great Britain's program of intensified food production. Therefore, as to both materials, the question is whether the bare fact that they moved for export as lend-lease material is enough to override proof of intended use as agricultural fertilizer and establish that they nevertheless constituted (a) military property (b) moving for military and not for civil use.

5. The bare fact of exportation under the lend-lease program fails to establish, or even to indicate, that the shipments constituted military property moving for military and not for civil use. The term "defense article," as defined in the Lend-Lease Act, embraced every known variety of material susceptible of any kind of use in either immediate or indirect support of the total war effort of any country whose defense the President deemed vital to the defense of the United States, including distinctly civilian property for demonstrably civil use. This is conclusively shown (a) by the language employed in the Act itself to define defense articles; (b) by the practical construction consistently placed upon the statutory definition by the Executive Department charged with administration of the Act; and, (c) by the affirmative approval and adoption by Congress of that practical construc-

tion, as evidenced by repeated appropriation of billions of dollars for continued administration of the Act as construed by the Executive Department.

6. The case would thus clearly be with the respondents even under the most liberal construction consistent with the language of the exception contained in Section 321(a). In view of the burden resting upon the United States to bring the shipments in question within the purview of that exception strictly construed, it is clear, *a fortiori*, that the counterclaim must fail.

XII.

CONCLUSION

Petitioner having failed to establish its counterclaim, the judgment below should be affirmed.

Respectfully submitted,

W. R. C. Cocke,

Thomas L. Preston,

F. S. Sargeant,

Counsel for Respondents.

Norfolk, Virginia,
December 27, 1946.

APPENDIX A

THE LEND-LEASE ACT

[Public Law 11—77th Congress]
[Chapter 11—1st Session]
[H. R. 1776]

AN ACT

Further to promote the defense of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States."

Sec. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term "defense article" includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term "defense information" means any plan, specification, design, prototype, or information pertaining to any defense article.

Sec. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the

interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph, except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

Sec. 4. All contracts or agreements made for the disposition of any defense article or defense information pursuant to section 3 shall contain a clause by which the foreign government undertakes that it will not, without the consent of the President, transfer title to or possession of such defense article or defense information by gift, sale, or otherwise, or permit its use by anyone not an officer, employee, or agent of such foreign government.

Sec. 5. (a) The Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government involved shall, when any such defense article or defense

information is exported, immediately inform the department or agency designated by the President to administer section 6 of the Act of July 2, 1940 (54 Stat. 714), of the quantities, character, value, terms of disposition, and destination of the article and information so exported.

(b) The President from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act except such information as he deems incompatible with the public interest to disclose. Reports provided for under this subsection shall be transmitted to the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, if the Senate or the House of Representatives, as the case may be, is not in session.

Sec. 6. (a) There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this Act.

(b) All money and all property which is converted into money received under section 3 from any government shall, with the approval of the Director of the Budget, revert to the respective appropriation or appropriations out of which funds were expended with respect to the defense article or defense information for which such consideration is received, and shall be available for expenditure for the purpose for which such expended funds were appropriated by law, during the fiscal year in which such funds are received and the ensuing fiscal year; but in no event shall any funds so received be available for expenditure after June 30, 1946.

Sec. 7. The Secretary of War, the Secretary of the Navy, and the head of the department or agency shall in all contracts or agreements for the disposition of any defense article or defense information fully protect the rights of all citizens of the United States who have patent rights in and to any such article or information which is hereby authorized to be disposed of and the payments collected for royalties on such patents shall be paid to the owners and holders of such patents.

Sec. 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

Sec. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

Sec. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States except insofar as such use relates to the manufacture, procurement, and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act.

Sec. 11. If any provision of this Act or the application of such provision to any circumstance shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other circumstances shall not be affected thereby.

Approved, March 11, 1941.

APPENDIX B

LEND-LEASE REPORTS

"The President from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act except such information as he deems incompatible with the public interest to disclose."

(From Section 5, subsection b, of "An Act to Promote the Defense of the United States" (Public Law No. 11, 77th Congress, 1st Session).)

IDENTIFICATION OF REPORTS TO CONGRESS UNDER THE LEND-LEASE ACT

First Report	Senate Document No. 66, 77th Congress, 1st Session
Second Report	Senate Document No. 112, 77th Congress, 1st Session
Third Report	Senate Document No. 149, 77th Congress, 1st Session
Fourth Report	House Document No. 661, 77th Congress, 2nd Session
Fifth Report	House Document No. 799, 77th Congress, 2nd Session
Sixth Report	House Document No. 839, 77th Congress, 2nd Session
Seventh Report	House Document No. 904, 77th Congress, 2nd Session
Eighth Report	House Document No. 57, 78th Congress, 1st Session
Ninth Report	House Document No. 129, 78th Congress, 1st Session
Tenth Report	House Document No. 209, 78th Congress, 1st Session
Eleventh Report	House Document No. 263, 78th Congress, 1st Session
Twelfth Report	House Document No. 353, 78th Congress, 1st Session
Thirteenth Report	House Document No. 375, 78th Congress, 2nd Session
Fourteenth Report	House Document No. 497, 78th Congress, 2nd Session
Fifteenth Report	House Document No. 616, 78th Congress, 2nd Session
Sixteenth Report	House Document No. 674, 78th Congress, 2nd Session
Seventeenth Report	Report to Congress of Foreign Economic Administrator Leo T. Crowley, dated September 25, 1944.
Eighteenth Report	House Document No. 98, 79th Congress, 1st Session
Nineteenth Report	House Document No. 189, 79th Congress, 1st Session
Twentieth Report	House Document No. 279, 79th Congress, 1st Session
Twenty-first Report	House Document No. 432, 79th Congress, 2nd Session
Twenty-second Report	House Document No. 663, 79th Congress, 2nd Session

EXTRACTS FROM REPORTS TO CONGRESS ON OPERATIONS UNDER THE LEND-LEASE ACT, MADE PURSUANT TO THE ABOVE-QUOTED PROVISION OF THE ACT:

(Italics supplied throughout)

SECOND REPORT

(p. 21) "In the case of the United Kingdom, for instance, hundreds of thousands of tons of food have gone safely across the North Atlantic to maintain the health and stamina of *British workingmen* and British soldiers. *The army of today, more than ever before, depends upon the workingmen behind the lines who produce the instruments of modern war. The American farmers have contributed much to the maintenence and expansion of*

Britain's war effort and through this to the defense of the United States."

* * * *

(p. 23) "Variety of Aid Made Available—These vessels have carried many cargoes, since the achievement of a maximum war effort requires far more in the way of supplies than merely arms and ammunition.

The supplying of essential machine tools or critical raw materials to British users may well result in 10 or 100 times their value in terms of arms and ammunition eventually finding its way to Britain's battle fronts. To this end, critical examination has been and is being made of the war effort of the entire British Empire, so that the most efficient use possible may be made of United States resources in promoting its defense *through maintaining the productive capacity of others."*

* * * *

(p. 25) "There have been shipped to the (Netherlands East) Indies from the United States arms and ammunition of all kinds; bomber, fighter, and trainer aircraft; naval boats and tanks; as well as *a wide assortment of commercial goods urgently needed for the minimum existence level of this island territory cut off from its home sources of supplies."*

THIRD REPORT

(p. 11) "Lend-Lease aid * * * includes *the raw materials and machine tools that have made it possible for the Lend-lease countries to step up their production of war material."*

* * * *

(p. 12) "Indicative of the magnitude of aid rendered thus far is the physical volume of *non-military articles* transferred."

* * * *

(p. 24) "THE FOOD FRONT.—Within recent weeks Lend-Lease foods marked 'Produce of the U. S. A.' are beginning to appear in sizable quantities *on grocers' shelves and in the kitchens of Great Britain.* Since the last report to the Congress, Lend-Lease

food has moved steadily and in increasing quantities over the bridge of ships, bringing new strength to the bodies and new hope to the minds and spirits of *the British people.*

"* * * Britain was faced a year ago with a quarter less animal protein foods than she had before the war. Had this continued, the health and the *working* and fighting efficiency of *her people* would have been undermined.

"* * * Since 1939, (British) acres under cultivation have increased from 12,000,000 to 16,000,000 and some further expansion is expected. *To aid this source of production, tractors and other farm equipment have been supplied by Lend-Lease and deliveries of seed are planned.*

* * * *

(p. 25) "Increasing quantities of Lend-Lease food shipments make themselves felt in many ways. * * * Canned meats and canned fish, because of supplies we have furnished, are now appearing on the ration lists for the first time. In the month of December, *the (English) housewife will be able to buy with one person's monthly allowance a half pound of canned meat, a quarter pound of canned fish and a pound tin of pork and beans.*"

* * * * *

(pp. 25-26) "We have made no more important contribution on the food front than our shipments of concentrated vitamins, which being small in bulk, have frequently been transported to Britain by bomber. *Supplemented by supplies of concentrated fruit juices from the United States, these vitamin shipments are largely responsible for a new project of free distribution of vitamins to children under 2 years of age. Beginning in December, over 1,300,000 small children are receiving, through maternity and child-welfare clinics and local food officers, a regular supply of concentrated orange or black-currant juice, and of cod liver oil compound.*"

FOURTH REPORT

(p. 21) "*Lend-Lease machinery and other equipment is fortifying the heavy industries and agriculture of our allies.* Ameri-

can medical supplies are helping to repair human damage done by bombings and to maintain the health of soldiers at the front. Our textiles and leathers help to clothe the military and *civil* armies fighting with us."

* * * *

(p. 22) "*Because of lend-lease demands, domestic production of Vitamin C is being expanded, and this vitamin is being supplied to British children in the form of concentrated orange juice or as an ingredient in jam.* Vitamin B-1, sometimes called the 'morale vitamin,' is sent to the United Kingdom to enrich flour."

SEVENTH REPORT

(pp. 19-20) "Our exports provide two out of every five ounces of the cheese which Britons eat and almost all their powdered milk."

* * * *

(p. 20) "We have exported a considerable percentage of our total production of canned fish to supplement the restricted meat rations of our allies' armed forces and *civilians.*"

(p. 5) "We also have another task, which will grow in magnitude as our striking power grows, and as new territories are liberated from the enemy's crushing grip. That task is to supply medicines, food, clothing, and other dire needs of those peoples who have been plundered, despoiled and starved."

(pp. 24-25) "Less than a week after our landing in North Africa, the Lend-Lease Administrator was instructed, in cooperation with General Eisenhower and the State Department, to extend aid to those areas in French Africa occupied by United Nations forces.

"The policy of the United States, already announced, is to provide food, medicines, and other necessities to alleviate the hunger and suffering of the people in any territory occupied by our forces, so far as it is humanly within our power to do so. Weapons will be furnished to the armed forces of these territories to hasten the defeat of the Axis.

"Methods of carrying out this policy will differ between areas,

and different methods may be necessary within the same area. Where commercial channels of supply have been cut off, lend-lease can be the instrument for renewing them. Where relief distribution is necessary, lend-lease can supply the materials of relief.

"Steps have already been taken with respect to North Africa in execution of this policy. About $5,000,000 worth of civilian goods have been purchased for shipment to that area. Many times that amount will be procured during the coming months, to be sent as shipping space becomes available. So long as military operations continue in this area, the amount of available shipping space cannot accurately be predicted. Cargoes necessary to maintain our armies in the field will have top priority on shipping, but civilian supply will come next on the list.

"Items purchased, or to be purchased, under this program include: Medical and hospital supplies ranging from anaesthetics to operating knives, sulfa drugs and antitoxins; sugar, powdered and evaporated milk, and cheese, to meet the most urgent food needs; cotton textiles, ready-made new and used clothing, and shoes; copper sulphate to increase the production of vegetables and fruits for the consumption of our troops as well as the inhabitants; coal for transportation and kerosene for lighting. The United Kingdom will participate in this program with the United States. * * *

"The United Nations have shown that they are capable of military teamwork of a high degree. In the field of relief and rehabilitation, they have an opportunity to develop a constructive program that will have a most direct bearing on the problems of the peace."

TENTH REPORT

(pp. 10, 12) "We have shipped more than $1,600,000,000 worth of agricultural products. Most of this has been food shipped principally to Russia, for the Soviet Army, and to Great Britain, for the British armed forces *and those on the production front who are supplying the fighting lines.*"

(pp. 17-19) "Since the invasion (of North Africa) last November, lend-lease has had a double job. In addition to the mili-

tary equipment we have sent to the United Nations forces there, *we have supplied food, clothing, medicines, and other necessities of life for the civilian population behind the lines.* These had a value of $32,205,000 up to April 1 and have been essential to the success of our military operations. Lend-Lease food and medicines are now being distributed to the people of war-torn Tunisia. The British have also sent large quantities of such supplies. We have also sent materials and equipment to aid in restoring the production of strategic and critical raw materials.

"Even though the grasp of the Axis on North Africa has now been broken, lend-lease supplies to that area are of continuing importance to the United Nations war effort. We must continue to supply munitions and war equipment to the armies of our French allies in North Africa so that they may be properly trained and equipped to play their part in the invasions to come. *We must continue, moreover, to supply the essential civilian needs of North Africa as a military and political necessity.* * * *

"In the invasion to come, lend-lease supplies will have a two-fold task; to furnish aid to the invading forces of the United Nations, *and to aid the peoples of liberated areas.* Lend-lease will continue to furnish greater and greater amounts of war supplies to the United Nations armies. *Lend-lease supplies will also be needed to assist the people of newly liberated areas to help themselves and the United Nations through restoring the production of their farms, factories and mines.*"

(p. 20) "Through the Middle East Supply Center we are helping to provide, both on a cash and a lend-lease basis, *supplies needed to prevent a breakdown of the civilian economy of Iraq, Iran, Egypt, and other countries of the region,* although most such requirements have been met by the British Commonwealth. Lend-lease munitions and materials needed for war production and transportation are also going to Turkey from the United States along with British munitions."

ELEVENTH REPORT

(p. 7) "The other United Nations produce most of the munitions and other war supplies which they use, but lend-lease pro-

vides many weapons which they are not in a position to produce themselves, food which augments their inadequate supply, and *raw materials and industrial equipment which enable them to expand their output of finished munitions and to meet essential civilian needs.*"

* * * *

(p. 24) "*Lend-lease agricultural machinery and seeds have been shipped to facilitate planting, cultivating and harvesting.*"

* * * *

(p. 26) "Food * * * is being shipped to our Allies for use by their armed forces and by their *civilians* working behind the lines. * * * Exports of food to North Africa have been decreasing, *but large amounts of seeds for planting have been sent in order to expand food production* and diminish the necessity for further food shipments."

* * * *

(p. 28) "Foods were shipped to North Africa to tide the *civilians* over until the 1943 crop could be harvested. *With the aid of more than 400,000 pounds of lend-lease seeds, large crops were planted and are already being harvested.*"

(pp. 5-6) "Except for the responsible fascist leaders, the people of the Axis need not fear unconditional surrender to the United Nations. I have said that we shall bring food for the starving and medicine for the sick in the areas liberated by the United Nations. We have done so, under lend-lease, in North Africa. We are doing so in Sicily. *We shall continue to do so in other areas, as they are liberated, to prevent economic breakdown and to aid the liberated peoples to produce and help themselves. We shall provide these necessary civilian supplies in support of our military operations and as a matter of simple humanity.*"

THIRTEENTH REPORT

(p. 8) "*Without supplementary war supplies under lend-lease, factories abroad that are producing tens of thousands of planes and guns and tanks to smash German and Japanese bases and*

production centers would have been able to contribute far less to the defeat of the enemy; and millions of men in allied lands who have marched into battle *or worked long hours in munitions plants* might not have had enough food to carry on."

* * * *

(p. 21) "We have also sent other types of concentrated foods, such as dried milk, dried fruit, concentrated fruit juices, and dehydrated vegetables. These are essential to the health of the armed forces and *workers in munitions industries,* yet require a minimum of shipping space."

* * * *

(p. 22) "Lend-lease aid to the United Kingdom has involved hundreds of special projects. For example, after studies in London and Washington revealed serious shortage of coal for future military operations and essential *civilian* requirements, lend-lease funds were made available for the purchase of relatively small amounts of *mining machinery to be used to increase production of coal in the United Kingdom.*"

FOURTEENTH REPORT

(p. 33) "In addition to food, we have sent about 9,000 tons of *seeds for the production in Russia of more food in devastated areas now reconquered and in newly developed farmlands far in the interior.*"

FIFTEENTH REPORT

(pp. 18, 20) "Shipments of food and other agricultural products to the United Kingdom have been of vital importance to *British war production* and British fighting power. * * * Coupled with a great increase in Britain's home food production they have made it possible for the *war workers* and fighting forces of the British Isles to have enough to eat to sustain an intensive war effort that is now in its fifth year."

* * * *

(p. 30) "Almost two billion dollars worth of lend-lease war supplies have been shipped to the Pacific and Far East theatres for the war against Japan. Approximately three-fifths of these supplies have consisted of fighting equipment for the Australian,

New Zealand, Chinese, Dutch, British, and Indian army, air, and naval forces fighting beside the United States forces. Almost all the remaining shipments have consisted of *industrial materials and products for the production of fighting equipment, food, and strategic raw materials in Australia, New Zealand and India.*"

(p. 38) "Civilian supplies shipped to French Africa under lend-lease are paid for at full landed cost. With the help of these shipments production of food and other materials needed for the United Nations war effort is being increased. *We have sent to Tunisia and Morocco, for example, equipment to increase production at the phosphate mines. The fertilizer produced by these mines is needed both for the United Kingdom's intensive food-production program and for the restoration of food production in the liberated areas of occupied Europe.* Seeds, insecticides, farm tools, parts for agricultural machinery, binder twine and other supplies have been sent to increase the production in North Africa of food needed by our forces. Railroad equipment has been sent to West Africa and Equatorial Africa so that greater quantities of peanut and palm oils, cocoa, mahogany, tin, copper, jute and other strategic materials and commodities needed by the United Nations can be brought out from the interior to the coast."

SIXTEENTH REPORT

(p. 9) "And *the British workers who built the plane* and the R.A.F. crew that flew it against the Germans got enough to eat because lend-lease food was included in their rations."

* * * * *

(p. 25) "With this additional food from us, the British have been able to maintain the rations of their *war workers*, at a level considerably lower than ours, but still sufficient for working efficiency."

* * * * *

(p. 30) "*To assist the Soviet people in the production of their own foods*, particularly in the recently liberated Ukraine, and to relieve their dependence on outside sources, we have also shipped 17,000 tons of *seeds* since lend-lease to Russia began."

SEVENTEENTH REPORT

(p. 9) "Friendly *non-belligerent* countries have been supplied from the United States with the minimum quantities of *consumer and industrial goods required to enable them in turn to supply other commodities essential for allied war production.*"

* * * *

(p. 26) "Military equipment for lend-lease is supplied by the War and Navy Departments. *Foodstuffs, industrial materials and equipment and other non-military lend-lease goods* are supplied by the Foreign Economic Administration, with the aid of the Treasury Department and the War Food Administration in domestic procurement and with the aid of the War Shipping Administration in arranging for transportation."

* * * *

(p. 39) *"While a major part of lend-lease exports has consisted of military equipment, lend-lease has also introduced to countries all over the world thousands of other American products—from trucks and machine tools to packaged foods—in a volume and variety never approached before. After the war the people of many countries will want to continue to obtain these and similar products from us by buying them."*

(p. 12) EIGHTEENTH REPORT

LEND-LEASE TRANSFERS OF INDUSTRIAL MATERIALS AND PRODUCTS

Cumulative from March 11, 1941 to December 1, 1944
Thousands of Dollars

CATEGORY	AMOUNT
Signal Equipment, Supplies and Materials	$ 733,611
Quartermaster Equipment, Supplies and Materials	616,035
Chemical Warfare Equipment	213,209
Engineer Equipment, Supplies and Materials	454,926
Medical Equipment, Supplies and Materials	80,374
Supplies for Servicing of Vessels	159,422
Equipment, Materials, and Supplies for Naval and Military Bases	244,293
Chemicals	194,719
Metals and Minerals	1,606,786
Railroad and Roadbuilding Equipment, Materials and Supplies	316,633
Machine Tools, Foundry Equipment, and other War Production Equipment	1,040,695
Agricultural Implements	51,103
Miscellaneous Items	524,699
TOTAL INDUSTRIAL MATERIALS AND PRODUCTS	$6,397,588

(pp. 12-13) "Industrial raw materials and equipment for war production have enabled our allies to make the actual weapons of war in their own factories. Lend-Lease materials and equipment are used to fill critical deficits in the war production of our allies. By sending them alloys, for example, we enable them to use their own iron to make steel. By sending them tools, we enable them to use this steel to make tanks and guns. What the arsenals of our allies produce relieves to that extent the strain upon our own resources and manpower in the United States."

Nineteenth Report

(p. 41) "Total shipments of horseshoe nails during the entire year of 1943 to French North and West Africa constituted less than a single month's production in the United States. This was also the case during 1944. The amounts sent were far from adequate to meet the needs for horseshoe nails in these countries *which were important sources of agricultural supplies during this period for our troops in Africa and southern Europe.*"

"The farms along the coastal plain in North Africa and in the plateau region in Tunisia and eastern Algeria before the war were as modern as farms in the United States. Over 50 per cent of the crops in North Africa were produced by the French colonists who owned large parcels of land and used American machinery and American methods. The *combines* we have shipped have served as replacements for pre-war equipment which was worn out or destroyed in the war. All lend-lease farm machinery sent to this area is paid for in full by the French."

SUPREME COURT OF THE UNITED STATES

Nos. 56 and 57.—October Term, 1946.

The United States of America, Petitioner, v. Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
The United States of America, Petitioner, v. Atlantic Coast Line Railroad Company.	

56

57

[March 3, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases involve controversies between the United States and respondent carriers over the transportation charges for shipments of government property in 1941. In one case phosphate rock and superphosphate are involved; in the other, phosphate rock. In both the commodities were purchased by the United States, shipped on government bills of lading over the lines of respondents, and consigned to the British Ministry of War Transport. They were exported to Great Britain under the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. I, § 411 *et seq.*, for use as farm fertilizer under Britain's wartime program for intensified production of food. It is agreed that these shipments were "defense articles" as defined in § 2 of that Act.[1]

[1] The term includes "Any agricultural, industrial or other commodity or article for defense."

Respondents billed the United States for transportation charges on these shipments at the commercial rate and were paid at that rate. The Seaboard is a land-grant railroad. The Atlantic Coast Line is not; but it entered into an equalization agreement with the United States in 1938 under which it agreed to accept land-grant rates for shipments which the United States could alternatively move over a land-grant road.[2] The General Accounting Office excepted to these payments on the ground that land-grant rates were applicable. The amounts of the alleged overpayments were deducted from subsequent bills concededly due by the United States. Respondents thereupon instituted suits under the Tucker Act, 36 Stat. 1091, 1093, as amended, 28 U. S. C. § 41 (20), to recover the amounts withheld. The United States counterclaimed for the difference between the amounts due under the commercial rate and those due under the land-grant rate and asked that the difference be set off against the claims of respondents and that the complaints be dismissed. The District Courts gave judgment for respondents. The Circuit Court of Appeals affirmed. 152 F. 2d 228, 230. The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government.

For years the land-grant rate was fifty per cent of the commercial rate and was applicable to the transportation of property or troops of the United States. 43 Stat. 477,

[2] The points from which the phosphate was moved by the Atlantic Coast Line are also stations on the Seaboard Line. Hence the United States is entitled to secure land-grant deductions from the Atlantic Coast Line if the Seaboard would have been subject to land-grant rates on those articles.

Since the land-grant rates were substantially lower than the commercial rates, roads which competed with the land-grant lines were unable to get the government business. For that reason they entered into equalization agreements. *See Southern Ry. Co. v. United States*, 322 U. S. 72, 73–74.

486, 10 U. S. C. § 1375; *United States* v. *Union Pacific R. Co.*, 249 U. S. 354, 355; *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 73. A change was effected by the Transportation Act of September 18, 1940, 54 Stat. 898, 954, 49 U. S. C. § 65. See *Krug*, v. *Santa Fe Pac. R. Co.*, 329 U. S. —. All carriers by railroad which released their land grant claims against the United States[3] were by that Act entitled to the full commercial rates for all shipments, except that those rates were inapplicable to the transportation of "military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . ." § 321 (a).[4] The Seaboard filed such a release. Accordingly, the question presented by these cases is whether the fertilizer was "military or naval property of the United States moving for military or naval and not for

[3] Section 321 (b).

[4] This provision was eliminated from § 321 (a) by the Act of December 12, 1945, 59 Stat. 606, 49 U. S. C. Supp. V, § 65 (a). Section 2 of that Act made October 1, 1946, the effective date of the amendment but provided that "any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment."

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, who had charge of the bill on the floor, made the following statement concerning pending controversies of the nature involved in the instant cases:

> "Now, Mr. President, I wish to repeat what I said a moment ago. It should be made perfectly clear that the passage of this bill resulting in the repeal of the land-grant rates will have no effect whatever upon the controversies as to the proper classification of this material, provided it has moved prior to the effective date of the act. These controversies, which were discussed extensively at the hearings, will have to be settled by the courts; and action on the present bill, if favorable, will have no effect whatever upon the question of whether materials that have moved prior to the repeal fall within or without the classification of military or naval property." 91 Cong. Rec. p. 9237.

civil use" within the meaning of § 321 (a) of the Transportation Act.

The legislative history of the Transportation Act of 1940 throws no light on the scope of the except clause.[5] But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of "all" property of the United States that is excepted but only the transportation of "military or naval" property of the United States. In the second place, the excepted property must be "moving for military or naval and not for civil use." Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation.

The bulk and main stress of petitioner's argument are based on the Lend-Lease Act which was enacted about six months after the Transportation Act. It is pointed out that in the case of every shipment under the Lend-Lease Act there was a finding by the Executive that the shipment would promote our national defense,[6] that the Act was

[5] See H. Rep. No. 2016, 76th Cong., 3d Sess., p. 87; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 98. Relief from land grant deductions was urged on the basis of the financial plight of the railroads and the substantial increase in government traffic which occurred in the 1930's. See Report of President's Committee of September 20, 1938, I Hearings, House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, pp. 261, 271–272; Public Aids to Transportation (1938), Vol. II, pp. 42–45. The section finally enacted appears to represent a compromise between a House Bill eliminating land-grant rates entirely (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27) and a Senate Bill which by its silence left them unchanged. S. 2009, 76th Cong., 1st Sess.

[6] The authority was vested in the President who might, when he deemed it "in the interest of national defense," authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government to lease, lend, etc., "any defense article". § 3 (a) (2).

indeed a defense measure,[7] and that unless the administration of that Act is impeached, all lend-lease "defense articles" fall within the except clause and are entitled to land-grant rates.

Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption, sustained the war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions.

So for us the result would be clear if the standards of the Lend-Lease Act were to be read into the Transportation Act. For the circumstance that the fertilizer was to be used by an ally rather than by this nation would not be controlling.

Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. And that difficulty is not surmounted though the exception in § 321 (a) be construed, as it must be, *Northern Pacific R. Co.* v. *United States*, No. 400, decided this day, strictly in favor of the United States.

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[7] The Act was entitled "An Act to Promote the Defense of the United States"; and the interests of national defense were the standards governing its administration, as § 3 (a) (2), *supra*, note 6, makes plain. The same purpose is evident from the Committee Reports. H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11; S. Rep. No. 45, 77th Cong., 1st Sess., p. 2. And as President Roosevelt stated on September 11, 1941, in transmitting the Second Report under the Act, "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America. . . . The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace." S. Doc. No. 112, 77th Cong., 1st Sess., p. VI.

In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. They were different at least in terms from the standards of the Lend-Lease Act; and they were provided at a time when Congress was much concerned with the problems of national defense. In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened,[8] alien registration was required,[9] training of civilians for military service was authorized,[10] development of stock piles of strategic and critical materials was encouraged [11]—to mention only a few of the measures being passed in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense, § 321 (a) of the Transportation Act was couched in different terms. In other parts of that Act,[12] as in many other Congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard

[8] See, for example, Act of June 11, 1940, 54 Stat. 265, 292, 297; Act of June 13, 1940, 54 Stat. 350, 377; Act of June 14, 1940, 54 Stat. 394; Acts of June 15, 1940, 54 Stat. 396, 54 Stat. 400; Act of June 26, 1940, 54 Stat. 599.

[9] Act of June 28, 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.*

[10] Act of September 16, 1940, 54 Stat. 885, 50 U. S. C. App. § 301 *et seq.*

[11] Act of September 16, 1940, 54 Stat. 897.

[12] Thus § 1 emphasized the policy in establishing a national transportation system adequate, *inter alia*, to meet the needs "of the national defense".

written into § 321 (a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—"military or naval" use as contrasted to "civil" use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which § 321 (a) was written we are reluctant to conclude that Congress meant "all property of the United States transported for the national defense" when it used more restrictive language.

In the second place, the language of § 321 (a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321 (a) uses "military or naval" use in contrast to "civil" use. Yet if these fertilizer shipments are not for "civil" use, we would find it difficult to hold that like shipments by the Government to farmers in this country during the course of the war were for "civil" use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote § 321 (a). If that is not the distinction, then "for military or naval and not for civil use" would have to be read "for military or naval use or for civil use which serves the national defense." So to construe § 321 (a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend "civil" and "military" when Congress undertook to sepa-

rate them. Yet § 321 (a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between "military" and "civil" which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in days of peace, at times when there is hurried activity for defense, or during a state of war.

In the third place, the exception in § 321 (a) extends not only to the transportation of specified property for specified uses. It extends as well to "the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . ." That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others.[13] Thus, the entire except clause contained in § 321 (a) will receive a more harmonious construction if the scope of "military or naval" is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause.

In sum, we hold that respondents in these cases were entitled to the full applicable commercial rate for the

[13] The provision under land-grant legislation that "troops of the United States" should be transported at half rates was held not to include discharged soldiers, discharged military prisoners, rejected applicants for enlistment, applicants for enlistment provisionally accepted, retired enlisted men, or furloughed soldiers en route back to their stations. *United States* v. *Union Pacific R. Co., supra.* The same result was reached in the case of engineer officers of the War Department who were assigned to duty in connection with the improvement of rivers and harbors. *Southern Pacific Co.* v. *United States,* 285 U. S. 240.

transportation of the fertilizer. In *Northern Pacific R. Co.* v. *United States, supra*, we develop more fully the breadth of the category of "military or naval property" of the United States "moving for military or naval . . . use". It is sufficient here to say that the fertilizer was being transported for a "civil" use within the meaning of § 321 (a), since it was destined for use by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise serviced them in any of their activities.

Affirmed.

MR. JUSTICE RUTLEDGE dissents.